Washington Law Review

Volume 76 | Number 1

1-1-2001

Rights, Rights of Action, and Remedies: An Integrated Approach

Donald H. Zeigler

RIGHTS, RIGHTS OF ACTION, AND REMEDIES: AN INTEGRATED APPROACH

Donald H. Zeigler*

Abstract: Traditionally, courts equated rights and remedies. Consequently, courts sought to provide remedies for the violation of statutory rights even if a statute did not contain detailed enforcement provisions. In the 1970s, however, the U.S. Supreme Court transformed what had been a unified inquiry into whether a statutory provision should be judicially enforceable into three distinct questions and developed separate criteria for deciding whether a statute should be read to create a right, imply a right of action, or provide a remedy. Rights, rights of action, and remedies are inextricably related. The Court's attempt to separate these inseparable concepts has led to considerable confusion because decisions focusing on only one part of the equation fail to acknowledge the impact on other parts. Sometimes the Court disguises or actually misstates what it is doing. The Court has been wrong to divide rights, rights of action, and remedies and to develop separate tests to assess each of them. While a return to the traditional standards is impractical, the Court should integrate the separate tests and adopt a single test to answer what is actually a single inquiry: Does the applicable statutory provision entitle the plaintiff to the remedy he or she seeks? In answering that question, the Court should carefully examine statutory language, the overall statutory context, and possible reasons for caution in granting a remedy.

* Professor of Law, New York Law School. A.B., Amherst College; J.D., Columbia University. The author wishes to thank Brannon Heath, Randolf Jonakait, Richard Matasar, and Edward A. Purcell for their helpful comments on a draft of this Article.

INTRODUCTION

Traditionally, courts equated legal rights and remedies. A right without a remedy was said to be "a monstrous absurdity."[1] Consequently, whenever a right existed, courts strove to provide an appropriate remedy for its violation. Courts frequently applied this standard in actions to enforce a statute.[2] Because legislatures often enacted statutes creating rights and duties without detailed enforcement provisions, courts filled the void. Moreover, they did so without conducting an independent inquiry into whether the statute provided a right of action. Violation of the right alone required a remedy.[3]

1. Kendall v. United States, 37 U.S. (12 Pet.) 524, 624 (1838).

2. *See infra* Part I.A.

3. This Article defines a legal right in Hohfeldian terms. A legal right is one that imposes a correlative duty on another to act or refrain from acting for the benefit of the person holding the right. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *in* FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 35–38 (Walter W. Cook ed., 1919). In this context, a right of action, or cause of action, is the right "to seek judicial relief from injuries caused by another's violation of a legal requirement." Cannon v. Univ. of Chi., 441 U.S. 677, 730 n.1 (1979) (Powell, J., dissenting). A remedy is the relief a court grants, such as damages or an injunction. These definitions are discussed in detail *infra* Part II.

Although these principles did not guarantee effective redress in all cases,[4] they remained the governing principles in the federal courts until the 1970s. Then, quite abruptly, the U.S. Supreme Court divided what previously had been a single, unified inquiry into whether a statutory provision should be judicially enforceable into three separate questions. The Court announced that rights, rights of action, and remedies are "analytically distinct"[5] and developed separate criteria to decide whether a statute should be read to create a right, imply a right of action, or provide a remedy.[6]

The Court's trifurcated approach has caused several problems. Decisions that focus only on a right, a right of action, or a remedy are necessarily incomplete. Rights, rights of action, and remedies are inextricably related; one cannot make a decision about one of them without necessarily affecting the other two. The Court's attempt to separate these inseparable concepts causes confusion. It also has led the Court to disguise and even misstate what it is doing.

This Article contends that the Court is wrong to divide rights, rights of action, and remedies and to use different tests to assess each of them. It further argues that one integrated test should be adopted to answer what is actually a single inquiry: Does the applicable statutory provision entitle a plaintiff to the remedy he or she seeks? Deciding what the test should be and how it should be applied is not a simple matter. How one

---

4. *See infra* notes 15–16 and accompanying text.

5. Davis v. Passman, 442 U.S. 228, 239 (1979).

6. *See infra* Part I.B. While many scholars criticized the criteria developed for each inquiry, most implicitly accepted the new three-part framework. For particularly thoughtful discussions of the implied right of action cases, see generally Robert H.A. Ashford, *Implied Causes of Action Under Federal Laws: Calling the Court Back to* Borak, 79 NW. U. L. REV. 227 (1984); H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501 (1986); Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981); Thomas L. Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333 (1980); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861 (1996); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982); *see also* Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665 (1987).

For excellent discussions of the cases that develop the test to determine whether a federal statutory provision confers an enforceable right, see George D. Brown, *Whither* Thiboutot*? Section 1983, Private Enforcement, and the Damages Dilemma*, 33 DEPAUL L. REV. 31 (1983); Michael A. Mazzuchi, *Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 MICH. L. REV. 1062 (1992); Henry Paul Monoghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233 (1991); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985); and Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982).

answers these questions depends on one's views about underlying issues of federalism and separation of powers, and on several pragmatic concerns. To help lay the groundwork for a possible consensus, this Article presents two models governing the judicial enforcement of federal statutes denoted the "cooperative model" and the "adversarial model."[7] In formulating a new standard, it attempts to incorporate the generous and constructive aspects of the cooperative model and the cautionary concerns of the adversarial model.

This Article has three parts. Part I traces the development and application of the traditional standards equating rights and remedies from early English cases through U.S. Supreme Court decisions in the late 1960s. Part I then discusses the Court's separation of rights, rights of action, and remedies in the 1970s. Finally, it reviews the Court's development of separate criteria for deciding whether a statute should be read to confer a right, imply a cause of action, or provide a remedy.

Part II begins by making the case for the development of a single, integrated test to decide whether the statutory provision on which plaintiff relies entitles the plaintiff to the remedy he or she seeks. It explains why rights, rights of action, and remedies are inextricably related. Part II next explores the problems caused by the Court's attempt to separate the inseparable. Part II then describes the two models governing judicial enforcement of federal statutes.

Part III proposes a new standard that seeks to find a middle ground between the two models. The test, which is an analytic process rather than a set of factors or criteria, begins with a careful look at the statutory language on which a plaintiff relies, examines the provision in its overall statutory context, and considers possible reasons for caution in granting a plaintiff the remedy sought.

The new test would lead to more honest court opinions that acknowledge the full interrelation of rights, rights of action, and remedies. Use of the test would change the results of some U.S. Supreme Court decisions. The biggest change would occur in implied right of action cases because the proposed test replaces the current single-factor test used in those cases[8] with a broader, many-faceted standard. In the

7. The terms "cooperative" and "adversarial" refer to the relationship between the federal courts and Congress. The basic premise of the cooperative model is that federal courts should play a constructive, supportive role in interpreting and implementing federal legislation. The basic premise of the adversarial model is that federal courts should play a limited role in these endeavors, shifting most of the responsibility to Congress. *See infra* Part II.B.

8. The Court purports to consider "*solely* . . . whether Congress intended to create the private right of action asserted" by the plaintiff. Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (emphasis added).

course of explaining the proposed test, Part III discusses cases that might be decided differently under the new standard.

I. THE TRADITIONAL STANDARDS AND THEIR DEMISE

A. The Traditional Standards

The principle that rights must have remedies is ancient and venerable, and played an important role in English and American legal history. The principle underlies the rise of equity,[9] the merger of law and equity,[10] and the corresponding development of new codes of procedure.[11] The principle also provided the impetus for actions to redress violations of statutory rights.[12]

Early English and American cases enforcing statutes equated rights and remedies.[13] As Professor H. Miles Foy states: "The essential notion . . . was that persons suffering legal wrongs were entitled to judicial remedies. What is more, they were entitled to adequate

---

9. Chancery courts developed because common law courts often did not provide complete and effective redress of legal wrongs. *See* GEORGE T. BISPHAM, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY 9 (9th ed. 1915); 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 398 (7th ed. 1956). Equity courts enabled the English legal system to provide more complete relief. *See* 1 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 20–21 (5th ed. 1941) ("[T]he common law furnished a very meager system of remedies, utterly insufficient for the needs of a civilization advancing beyond the domination of feudal ideas."). It became a maxim of equity jurisprudence that "equity will not suffer a right to be without a remedy." BISPHAM, *supra*, at 56; *see generally* Zeigler, *supra* note 6, at 667–69.

10. Law and equity were merged so that legal rights could be better enforced. Zeigler, *supra* note 6, at 669. In both England and America, the existence of two separate judicial systems caused confusion and inconvenience. *See* Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 23 (1905); Edward R. Taylor, *The Fusion of Law and Equity*, 66 U. PA. L. REV. 17, 23 (1917). With the merger of law and equity, litigants could obtain both legal and equitable relief in one lawsuit. *See* William F. Walsh, *Merger of Law and Equity Under Codes and Other Statutes*, 6 N.Y.U. L. REV. 157, 169 (1929).

11. State legislatures promulgated new codes of civil procedure to better ensure the vindication of rights. *See* CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 21 (1897) ("[The code movement's] one great purpose was to bring procedure into a simple and natural relation with substantive law . . . [and] to give a natural and vigorous vitality to a maxim which the law had long placed before itself as the ideal—wherever a right, there a remedy.").

12. Actions on statutes probably have their origin in the early English Statute of Westminster II, which authorized an action on the case for those injured by breach of a statutory duty. The statute read: "Moreover, concerning the Statutes provided where the Law faileth, and for Remedies, lest Suitors coming to the King's Court should depart from thence without Remedy, they shall have Writs provided in their Cases . . . ." Statute of Westminster II, 1285, 13 Edw., ch. 50, § 2 (Eng.).

13. *See* Foy, *supra* note 6, at 526–32.

remedies."[14] Of course, this ideal was not always realized in practice.[15] As Professors Richard H. Fallon and Daniel J. Meltzer point out, "the structure of substantive, jurisdictional, and remedial doctrines that existed [in the eighteenth century] and that evolved through the nineteenth century by no means guaranteed effective redress for all invasions of legally protected rights and interests."[16] Nonetheless, people in those times believed that rights required remedies. In Justice Harlan's words, "contemporary modes of jurisprudential thought . . . appeared to link 'rights' and 'remedies' in a 1:1 correlation."[17]

In addition, when courts enforced rights in statutes that did not contain express remedies, they did not say that they were creating or implying a "cause of action" or a "private right of action" from the statute. The absence of such statements suggests that in this context[18] courts did not view a cause of action as a separate procedural entity, independent of a right and remedy, that had to be present for an action to go forward. Thus, modern references to early English and American cases as "implied right of action" cases may mischaracterize what the courts were doing.[19] Some early opinions suggested that an action on the case could be used to enforce a statutory right,[20] and perhaps the form of action provided something roughly analogous to what we would today call a cause of action. But early cases plainly did not inquire whether the statute at issue provided a separate cause of action or make a separate

14. *Id.* at 529.

15. As Professor Paul Gewirtz notes, the law of remedies is by nature a "jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy." Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983).

16. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1780 (1991). The authors note that common law privileges stood as barriers to full relief and that remedies were very limited in suits against the government and government officials. *Id.* at 1780–81.

17. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 401 n.3 (1971) (Harlan, J., concurring).

18. As Justice Cardozo once remarked, "[a] 'cause of action' may mean one thing for one purpose and something different for another." United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67–68 (1933).

19. *See, e.g.*, California v. Sierra Club, 451 U.S. 287, 299–300 & n.3 (1981) (Stevens, J., concurring) (stating that "implication of private causes of action was a well-known practice at common law and in American courts" and citing early English treatises and cases); Stewart & Sunstein, *supra* note 6, at 1206 & n.39 (stating that "[a]t common law, courts created private rights of action . . . by creating an action in damages for statutory wrongs" and citing early English treaties and cases); Patrick B. Fazzone, Comment, *Implied Rights of Action in Federal Legislation: Harmonization Within the Statutory Scheme*, 1980 DUKE L.J. 928, 929 n.2 ("The doctrine of implied rights of action has been traced to an English case, *Couch v. Steel*, 118 Eng. Rep. 1193 (K.B. 1854).").

20. *See, e.g.*, Couch v. Steel, 118 Eng. Rep. 1193, 1196 (K.B. 1854), discussed at *infra* note 23.

decision whether to create or deny a private right of action. Violation of the right alone required a remedy.

Ashby v. White[21] provides an example of courts equating rights and remedies without mention of a cause of action. The plaintiff claimed an official had improperly denied him the right to vote in an election and sought damages.[22] Chief Justice Holt cited an ancient statute conferring that right and concluded the plaintiff should have a remedy even though the statute did not provide one:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for . . . want of right and want of remedy are reciprocal. . . . Where a man has but one remedy to come at his right, if he loses that he loses his right.[23]

Early American cases also equated rights and remedies and did not identify a cause of action as a separate requirement for relief.[24] *Marbury*

---

21. 92 Eng. Rep. 126 (K.B. 1703).

22. *Id.* at 134.

23. *Id.* at 136 (Holt, C.J., dissenting). Originally, the majority decided for the defendant. *See id.* at 129–33. Subsequently, however, Chief Justice Holt's dissenting opinion was accepted by the House of Lords and judgment was entered for the plaintiff. *Id.* at 138.

The often-cited case of *Couch v. Steel*, 118 Eng. Rep. 1193 (K.B. 1854), also equates rights and remedies and does not discuss a cause of action. The plaintiff, a seaman, became ill on the defendant's ship. *Id.* at 1196. He brought suit for damages, claiming that the defendant had failed to comply with a statute requiring English ships to maintain "a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages." *Id.* Lord Campbell stated that an action on the case was generally available for "'damage by the wrong of another,'" and that "'in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompence of a wrong done to him contrary to the said law.'" *Id.* (quoting JOHN COMYNS, DIGEST 268 (1762)). Consequently, the seaman could recover. *Id.* at 1198.

The case was complicated by the fact that the statute provided for a penalty against the shipowner for its violation, to be paid in part to the person reporting the infraction and in part to the Seaman's Hospital Society. *Id.* at 1196. This raised the question whether a court could order a different remedy. Lord Campbell concluded that the statutory penalty was for the public wrong and did not abrogate the plaintiff's right to seek damages for the private wrong done to him. *Id.* at 1197. Lord Campbell added two qualifications. If a statute provided one mode of compensating plaintiff for his personal injuries, a court should not authorize another. And if the legislature specifically forbade an action by a person injured for violation of the statute, the person could not recover. *Id.*

Not all English cases of this era accord with *Ashby* and *Couch*. *See, e.g.*, Atkinson v. Newcastle & Gateshead Waterworks Co., 2 Ex. D. 441, 444 (1877) (questioning *Couch*); Stevens v. Jeacocke, 116 Eng. Rep. 647, 652 (Q.B. 1848) (holding that imposition of penalty precluded private remedy).

24. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 66 (1992) ("From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court, although it did not always distinguish clearly between a right to bring suit and a remedy available under such a right.").

v. Madison[25] provides a famous example. Marbury brought a mandamus action to compel the Secretary of State to deliver a commission signed by the President appointing him to the bench.[26] Chief Justice Marshall quoted Blackstone concerning the relation between right and remedy:

> "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . . [F]or it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."[27]

Kendall v. United States[28] provides another such example. Several individuals sought payment from the Postmaster General for performance of a contract to deliver mail.[29] Congress passed a statute directing the Solicitor of the Treasury to investigate and to determine the equities of the matter.[30] When the Postmaster refused to pay the full amount the Solicitor recommended, the individuals sued.[31] In granting relief, the Court stated:

> It cannot be denied but that congress had the power to command that act to be done; and the power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.[32]

---

25. 5 U.S. (1 Cranch) 137 (1803).

26. *Id.* at 153–54.

27. *Id.* at 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23). Chief Justice Marshall continued: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.*

28. 37 U.S. (12 Pet.) 524 (1838).

29. *Id.* at 608.

30. *Id.* at 608–09.

31. *Id.*

32. *Id.* at 624. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), mischaracterizes the statute involved in *Kendall*. Speaking for the majority, Justice White stated that the Act of Congress "accorded a right of action in mail carriers to sue for adjustment and settlement of certain claims for extra services but . . . did not specify the precise remedy available to the carriers." *Id.* at 67. As noted above, the statute was in the nature of a private bill that merely directed the Solicitor of the Treasury to look into the mail carriers' claim and recommend an equitable solution. *Kendall*, 37 U.S. at 528–29. The statute did *not* create a "right of action in mail carriers to sue." *Kendall* did not appear to consider a private right of action an independent or necessary part of the right-remedy equation. The modern Court is so accustomed to viewing a cause of action as a separate and necessary component of a lawsuit that it mistakenly read the statute in *Kendall* to create one.

Again, the Court closely related right and remedy without mentioning a cause of action.

During the late 1800s and early 1900s, American state courts routinely allowed private remedies for violations of statutes containing other sanctions,[33] although sometimes on a slightly different legal theory. Violation of a statute was said to constitute "evidence of negligence"[34] or "negligence *per se*."[35] Plaintiffs could recover if they were members of the class of persons for whose benefit the statute was intended and the harm suffered was of a kind that the statute generally was intended to prevent.[36] Arguably these cases recognize a cause of action for

---

33. *See, e.g.*, Osborne v. McMasters, 41 N.W. 543 (Minn. 1889); Schell v. Dubois, 113 N.E. 664 (Ohio 1916); Stehle v. Jaeger Automatic Mach. Co., 69 A. 1116 (Pa. 1908). For extensive citation to such cases, see W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 220–34 (5th ed. 1984).

34. *See, e.g.*, Vandewater v. N.Y. & New Eng. R.R., 32 N.E. 636, 636–37 (N.Y. 1892) (stating that violation of statute could be evidence of negligence, but reversing and remanding for new trial because applicable statute had been repealed at time of accident); McRickard v. Flint, 21 N.E. 153, 153 (N.Y. 1889) (stating that failure to perform statutory duty "is evidence upon the question of negligence").

The federal courts occasionally relied on this theory. For example, in *Hayes v. Michigan Central Railroad*, 111 U.S. 228 (1884), the plaintiff was a young boy whose left arm was severed in a collision with defendant's train. *Id.* at 231–32. The plaintiff claimed that the railroad had violated a Chicago ordinance granting it a right of way on the condition that it erect fences along the rail line to protect persons and property from danger. *Id.* at 229–30. The Court held that the failure to fence would support an action for personal injury, and that "this breach of duty will be evidence of negligence." *Id.* at 240. The railroad argued that it could not be liable to a member of the public injured by violation of the ordinance, *id.* at 233, but the Court disagreed. Because the City had enacted the ordinance to protect the public, "considered as composed of individual persons," it followed that "each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery." *Id.* at 240.

35. *See, e.g.*, Maney v. Chi., Burlington & Quincy R.R. Co., 49 Ill. App. 105 (1892); Correll v. Burlington, Cedar Rapids & Minn. R.R. Co., 38 Iowa 120, 121 (1874); Jetter v. N.Y. & Harlem R.R. Co., 2 Abbot 458, 464 (N.Y. 1865)

> [It is an] axiomatic truth that every person while violating an express statute is a wrong-doer, and, as such, is *ex necessitate* negligent in the eye of the law, and every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have.

Id. But see Brown v. Buffalo & State Line R.R. Co., 22 N.Y. 191, 195 (1860) (rejecting argument of plaintiff that violation of city ordinance prohibiting locomotives from running at more than six miles per hour "was alone evidence of carelessness, sufficient to charge the defendant with the consequences of the collision"). For support of the negligence per se rule, see Ezra R. Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914). The development of the theory that violation of a statutory duty constitutes negligence per se is discussed in Foy, *supra* note 6, at 540–48.

36. *See* KEETON ET AL., *supra* note 33, at 224–25. These standards were incorporated in the RESTATEMENT OF TORTS § 286 (1934):

> Violations Creating Civil Liability.

negligence as a separate element of the right-remedy equation. Negligence, however, was a general, pre-existing common law cause of action.[37] The courts did not purport to imply a new cause of action from the specific statutes in question. Nor did they apply any special criteria for deciding whether to use the negligence theory, other than the general requirements noted above.[38] The opinions also stressed the close relation between rights and remedies.[39]

Courts did not automatically grant relief every time a plaintiff came to court seeking to enforce a provision of a statute. Courts sometimes concluded that the statutory language did not actually create the rights and duties that the plaintiffs claimed or that granting relief would frustrate rather than further legislative intent.[40] Courts also denied relief

---

The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:

(a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual;

(b) and the interest invaded is one which the enactment is intended to protect;

(c) and, where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard;

(d) and, the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action.

Id.

37. *See* WILLIAM A. PROSSER, THE LAW OF TORTS 139–40 (1971) ("About the year 1825, negligence began to be recognized as a separate and independent basis of tort liability.").

38. The requirements that the statute be intended at least in part to protect the class of persons of which the plaintiff is a member and that the harm suffered was of a kind the statute generally was intended to prevent are plainly satisfied by, or are at least consistent with, the early English and American cases. The statute in *Ashby v. White*, 92 Eng. Rep. 126 (K.B. 1703), protecting the right to vote, plainly was intended to protect voters like Mr. Ashby and to ensure that voters were not improperly denied the right to vote. *Id.* at 135–36. Similarly, the statute in *Couch v. Steel*, 118 Eng. Rep. 1193 (K.B. 1854), requiring sufficient medicines on board during sea voyages clearly was intended to protect members of the crew like Couch and to prevent unnecessary suffering and sickness due to lack of proper medicine. *Id.* at 1196. The statute in *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838), directing the Solicitor of the Treasury to look into the plaintiffs' claim against the Postmaster was intended specifically to aid the plaintiffs in obtaining fair compensation under their contract to deliver mail. *Id.* at 608–09.

39. *See, e.g.*, Parker v. Barnard, 135 Mass. 116, 120 (1883) ("The fact that there was a penalty imposed by the statute for neglect of duty in regard to the railing and protection of the elevator well does not exonerate those responsible therefor from such liability."); Stout v. Keyes, 2 Doug. 184, 186 (Mich. 1845) ("It is a general principle of the common law, that whenever the law gives a right, or prohibits an injury, it also gives a remedy by action; and, where no specific remedy is given for an injury complained of, a remedy may be had by special action on the case."); Martin v. Herzog, 126 N.E. 814, 816 (N.Y. 1920) (Cardozo, J.) ("A statute designed for the protection of human life is not to be brushed aside as a form of words, its commands reduced to the level of cautions, and the duty to obey attenuated into an option to conform.").

40. *See, e.g.*, Pollard v. Bailey, 87 U.S. (20 Wall.) 520, 524–25 (1874), discussed at *infra* note 42.

when the legislature specifically forbade a particular remedy.[41] But even when courts denied relief, they conducted an integrated inquiry that treated the claimed right and proposed remedy as a unit.[42]

In 1916, the U.S. Supreme Court decided the often-cited case *Texas & Pacific Railway v. Rigsby*.[43] *Rigsby* strongly reaffirmed the equation of rights and remedies, but it also appeared to treat a cause of action as a separate part of the equation, thus foreshadowing the radical developments in the later part of the twentieth century. The plaintiff was a switchman for the railway company.[44] He was injured when a defective handhold gave way as he descended from the top of a box car.[45] He sued for damages under a federal statute requiring trains in interstate commerce to have secure handholds, and the Court held that such relief was available.[46] The Court reiterated the close, reciprocal relation between rights and remedies:

> A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages

41. *See supra* note 23.

42. *Pollard* provides a good example of an integrated right-remedy inquiry in a case denying relief without mention of a cause of action as a separate requirement. In 1854 the Alabama legislature chartered a new bank. *Pollard*, 87 U.S. at 521. The legislation contained provisions in case the bank became insolvent. *Id.* at 521–22. Individual stockholders were to be personally liable for all outstanding debts of the bank in proportion to their share of the stock. *Id.* at 521. If the bank could not pay a debt, the creditor could file a bill in the chancery court asking for a temporary injunction freezing the bank's assets and for appointment of a receiver. *Id.* After distributing the bank's assets, remaining debts could be assessed against each of the stockholders in proportion to his shares of stock. *Id.* at 521–22. In due course the bank became insolvent. *Id.* at 522. Bailey, a creditor, brought an action at law against one of the stockholders, Pollard, seeking $17,000, the full amount that Bailey was owed. *Id.*

The Court held that the Alabama statute did not grant Bailey a right to the relief that he claimed. *Id.* at 524–25. Pollard had a duty to pay only his pro rata share of the debts. *Id.* at 525. This proportion could be determined only after a pro rata distribution of the indebtedness among all the stockholders in an equity action. *Id.* Granting relief to Bailey would frustrate the clear legislative intent "only to charge the stockholders upon a proper account and in the manner" provided by the statute. *Id.* Moreover, the legislature also intended to distribute funds for the common benefit of all of the creditors. *Id.* at 527. The Court thought that "[e]very provision [of the statute] is entirely inconsistent with the idea that one creditor could, by an individual suit, appropriate to himself the entire benefit of the security, and exclude all others." *Id.* The court concluded with language that showed the close relation between the duty (and the right) and the remedy: "There was no liability except for the deficiency. That was to be apportioned and collected for the common benefit. . . . The liability and the remedy were created by the same statute. This being so the remedy provided is exclusive of all others." *Id.*

43. 241 U.S. 33 (1916).

44. *Id.* at 36.

45. *Id.* at 37.

46. *Id.* at 40.

> from the party in default is implied, according to a doctrine of the common law expressed . . . in these words: "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." (*Per* Holt, C.J., *Anon.*, 6 Mod. 26, 27.) This is but an application of the maxim, *Ubi jus ibi remedium. See* 3 Black. Com. 51, 123; *Couch v. Steel,* 3 El. & Bl. 402, 411; 23 L. J. Q. B. 121, 125.[47]

This language is often quoted by the U.S. Supreme Court and commentators[48] and is generally seen as a ringing endorsement of traditional conceptions of rights and remedies.[49] However, *Rigsby* also made several specific references to "a right of action" in the sentences immediately before and after the language quoted above, thus suggesting that the Court viewed a cause of action as a separate component of the rights-remedies equation.[50] Moreover, although the language is ambiguous, the Court may have been suggesting that it was inferring the cause of action from the statute itself.[51] Thus, *Rigsby* is a perplexing case in that it

---

47. *Id.* at 39–40. The term *ubi jus ibi remedium* is translated "[w]here there is a right, there is a remedy." BLACK'S LAW DICTIONARY 1695 (7th ed. 1999).

48. *See, e.g.*, Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 67 (1992); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374 n.52 (1982); California v. Sierra Club, 451 U.S. 287, 299–300 & n.3 (1981) (Stevens, J., concurring); Richard W. Creswell, *The Separation of Powers Implications of Implied Rights of Action*, 34 MERCER L. REV. 973, 975 (1983); Frankel, *supra* note 6, at 555.

49. *See, e.g.*, *Merrill Lynch*, 456 U.S. at 374–75 ("Under this approach, federal courts, following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule."); *Sierra Club*, 451 U.S. at 299–300 ("[In 1890,] Members of Congress merely assumed that the federal courts would follow the ancient maxim, '*ubi jus, ibi remedium.*'"); Creswell, *supra* note 48, at 975 ("Justice Pitney emphasized that he was applying a well-recognized common-law doctrine."); Foy, *supra* note 6, at 554 ("Justice Pitney wrote for the Court in *Rigsby* . . . . Justices Story or Marshall could have written the opinion. Indeed, Coke or Chief Justice Holt could have written it. *Rigsby* looked to the past, not to the future.").

50. Referring to different versions of the Federal Safety Appliance Act in the sentence immediately before the quoted language, the Court stated:

> None of the Acts, indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the Employers' Liability Act, has never been doubted.

Rigsby, 241 U.S. at 39. In the sentence immediately following the quoted language, the Court stated: "The inference of a private right of action in the present instance is rendered irresistible" by a provision of the Act stating that an employee injured by any car "in use contrary to the act shall not be deemed to have assumed the risk." *Id.* at 40.

51. The block quote in *supra* note 50 suggests this possibility because it focuses so specifically on provisions of the Act. *But see* Cannon v. Univ. of Chi., 441 U.S. 677, 732 (1979) (Powell, J.,

endorses the traditional close relation between rights and remedies while possibly introducing a new element into the equation.

While the seeds of current law treating rights, rights of action, and remedies as separate elements can be seen in *Rigsby*, in the years that followed the Court chose to reaffirm the close interrelation of rights and remedies, usually without mentioning a cause of action. In several cases seeking enforcement of the Railway Labor Act of 1926, the Court granted remedies that were not explicitly authorized by the statute.[52] The Court reasoned that the remedies must be available or else the rights conferred by the statute would not exist, and it made no reference to a cause of action as a separate requirement.[53] In *Bell v. Hood*,[54] the

---

dissenting) (suggesting novel view that *Rigsby* combined federal statutory standard with common law negligence claim).

Interestingly, the Court later talked about a cause of action in connection with subject matter jurisdiction. *See* Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916). As in *Rigsby*, the Court may have suggested that a cause of action is separate from a right and remedy, but the suggestion is only implicit. The plaintiff in *American Well Works* alleged that defendants maliciously and falsely libeled and slandered plaintiff's title to a pump by asserting that the pump infringed defendants' patent. *Id.* at 258. The Court held that the case did not arise under federal law because it was at base a tort case for defamation or for unlawful damage to plaintiff's business. *Id.* at 259–60. Justice Holmes announced the famous test that "[a] suit arises under the law that creates the cause of action," *id.* at 260, and since the plaintiff's cause of action was state-created, the case arose under state law. It is unclear from Holmes' opinion whether he was identifying a cause of action as a separate procedural entity or simply using the phrase as a short-hand to refer to the merits of the plaintiff's claims. The Court appears to have denied federal question jurisdiction because plaintiff asserted state-created rights and duties that did not turn on any questions of federal law.

52. *See generally* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944); Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks, 281 U.S. 548 (1930).

53. See, e.g., *Texas & New Orleans Railroad Co.*, 281 U.S. 548, where the Court enforced a provision of the Act that allowed employees to pick their own union representative without interference by the railroad. The railroad argued that the provision "confer[red] merely an abstract right which was not intended to be enforced by legal proceedings," *id.* at 558, but the Court concluded that "[t]he right is created and the remedy exists," citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *Tex. & New Orleans R.R. Co.*, 281 U.S. at 569–70. The Court believed that judicial enforcement of the non-interference provision would be manageable and that freedom of choice in selecting representatives was an essential element of the statutory scheme. *Id.* at 568–69. As the Court admitted in 1979, *Texas & New Orleans Railroad Co.* "is now understood as having implied a 'cause of action' although the opinion itself did not use the phrase." Davis v. Passman, 442 U.S. 228, 239 n.17 (1979).

In *Steele*, another case decided under the Railway Labor Act, the Court explicitly recognized that rights and duties do not actually exist without a remedy. *Steele* held that the Act imposed a duty on the exclusive bargaining representative of railroad firemen to represent all of the firemen without discrimination because of their race. 323 U.S. at 199–202. The Court stated:

> [T]he right here asserted, to a remedy for breach of the statutory duty . . . is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction.

plaintiffs sought damages for violation of constitutional rather than statutory rights. The Court once again affirmed the broad availability of remedies to enforce all legal rights and did not identify a private right of action as a separate component of the rights-remedies equation:

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.[55]

The reign of the traditional standards continued through the 1960s. In *J.I. Case Co. v. Borak*,[56] the Court allowed a shareholder of J.I. Case to

---

Id. at 207. The Court also stressed that enforcement of the right of fair representation would further the basic statutory purpose of avoiding interruptions to commerce by helping to avoid strikes. *Id.* at 199–200; *see also* Tunstall v. Bhd. of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944) (companion case to *Steele* reaffirming opinion in that case).

54. 327 U.S. 678 (1946).

55. *Id.* at 684 (citations omitted). Looking only at the quoted language, one might read the phrase "and a federal statute provides for a general right to sue for such invasion" to refer to a cause of action. Indeed, Justice White made this mistake in *Guardians Ass'n v. Civil Service Commission*, 463 U.S. 582 (1983), when he cited *Bell* for the proposition that "where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief." *Guardians Ass'n*, 463 U.S. at 595. However, the full opinion in *Bell* makes clear that the phrase refers to subject matter jurisdiction under the general federal question section of the United States Code, now 28 U.S.C. § 1331 (1994). *Bell*, 327 U.S. at 679. Plaintiffs claimed that federal agents violated their Fourth and Fifth Amendment rights. *Id.* The lower courts held that they lacked subject matter jurisdiction to hear such a claim. *Id.* at 680. The U.S. Supreme Court reversed on this point, holding that the case arose under federal law because the case necessarily turned on the scope of the protection afforded by the constitutional amendments. *Id.* at 684–85. The Court did not describe the issue facing the lower courts on remand as whether a private right of action could be inferred from the Fourth and Fifth Amendments. Instead, the Court stated that "[t]he issue of law is whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments," *id.* at 684, and the statements quoted in the text are some ruminations about that question. In any event, it is plain that the phrase "and a federal statute provides for a general right to sue for such invasion" could not refer to a section of the U.S. Code authorizing a damage action against federal agents for violation of the Constitution because no such section existed. Thus, the quoted language means that authority to grant any available remedy flows from a simple grant of subject matter jurisdiction. The Court does mention a cause of action earlier in the opinion, but in connection with the merits of plaintiffs' claim:

> Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.

Id. at 682.

56. 377 U.S. 426 (1964).

sue under §§ 14(a) and 27 of the Securities Exchange Act of 1934[57] for damages and to rescind a merger allegedly effected through false and misleading proxy statements. The Court brushed aside defendants' contention that the Exchange Act made no reference to a private right of action under § 14(a), stating that among the Act's "chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."[58] The Court also noted that private enforcement of the proxy rules "provides a necessary supplement to Commission action" due to the volume of proxy statements submitted annually.[59] Citing the liberal remedial language of several of the cases discussed above,[60] the Court allowed the suit to proceed.[61]

---

57. Section 14(a) of the Exchange Act, along with Rule 14a-9, which was promulgated pursuant thereto by the Securities and Exchange Commission, made it unlawful to issue false and misleading proxy statements. *See* Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78j(b) (1994); 17 C.F.R. § 240.14a-9 (2000). Section 27 is a jurisdictional provision that gives the federal district courts exclusive jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder." Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa; *J.I. Case Co.*, 377 U.S. at 427–33.

58. *J.I. Case Co.*, 377 U.S. at 432.

59. *Id.*

60. *Id.* at 433–34.

61. *Id.* at 435. Two decisions in 1960 reaffirmed the Court's broad power to order equitable remedies for violation of statutory duties. In *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960), the Court read § 10 of the Rivers and Harbors Act of 1899 to authorize the Attorney General to seek injunctive relief ordering the steel company to dredge a riverbed where it had deposited industrial solids. *Id.* at 485. The Act imposed a broad duty not to "obstruct" navigable waters and gave the Attorney General power to enforce the Act. *Id.* at 491–92. The Court stated: "Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation." *Id.* at 492.

In *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288 (1960), the Court read §§ 15(a)(3) and 17 of the Fair Labor Standards Act of 1938 to allow the Secretary of Labor to bring an action on behalf of DeMario Jewelry employees seeking wages unpaid in violation of the Act. *Id.* at 289. Section 15(a)(3) made it unlawful for an employer to discharge or otherwise discriminate against an employee because the employee filed a complaint under the Act, but it did not specify a remedy. *Id.* Section 17 merely gave the district courts jurisdiction to restrain violations of § 15. *Id.* The Court held that the remedy sought by the Secretary was easily within the Court's equitable power to enforce the statute:

> "[A]ll the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.... [T]he court may go beyond matters immediately underlying its equitable jurisdiction ... and give whatever other relief may be necessary under the circumstances.... Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command."

Id. at 291 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 397–98 (1946)). The Court reasoned that an action for reimbursement of lost wages was necessary to achieve congressional purposes. *Id.* Congress relied on information and complaints from employees to enforce the Act. *Id.* at 292. If

In the late 1960s, the Court also authorized judicial proceedings to enforce provisions of important civil rights statutes. The Court relied heavily on the traditional equation of rights and remedies in authorizing private suits to help achieve the broad remedial purposes of the legislation. None of these cases made reference to a private right of action as a separate procedural requirement.[62]

As in the past,[63] the Court did not grant relief to every plaintiff who sought a remedy for an alleged violation of a statutory duty. The Court denied relief if it thought the statute did not actually confer the plaintiff's claimed right[64] or that to grant relief would directly conflict with con-

---

employees could obtain only prospective relief reinstating them to their jobs, they would be reluctant to complain to officials about violations of the Act because they could not afford to lose their pay during the period while they sought reinstatement. *Id.* at 292–93.

62. *See, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544 (1969). The *Allen* Court allowed private individuals to seek declaratory judgments that changes in state voting laws were subject to § 5 of the Voting Rights Act of 1965, and thus, could not be implemented until the state complied with the approval requirements of the Act. *Allen*, 393 U.S. at 554–57. The Court stated that the Act's basic goal to make the Fifteenth Amendment a reality for all citizens would be "severely hampered" if citizens were required to rely solely on litigation instituted at the discretion of the Attorney General. *Id.* at 556. Similarly, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), allowed a private suit to enforce 42 U.S.C. § 1982, which provides that "[a]ll citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to . . . purchase . . . real and personal property." The Court stated:

> The fact that [the statute] is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy. *See, e.g., Texas & N.O. R. Co. v. Ry. Clerks*, [281 U.S. 548, 568–70 (1930)]; . . . *United States v. Republic Steel Corp.*, [362 U.S. 482, 491–92 (1960)]; *J. I. Case v. Borak*, [377 U.S. 426, 432–35 (1964)].

Jones, 392 U.S. at 414 n.13. Finally, *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), authorized a private damage action under § 1982, stating that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Id.* at 239. The Court quoted from *Rigsby, Texas & New Orleans Railroad Co.*, and *Bell. Id.* at 238–39.

In another important decision in this period that applied traditional standards, *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967), the Court allowed the government to sue to recover its expenses in removing a sunken barge from the Mississippi River. *Id.* at 193, 204. The Rivers and Harbors Act of 1899 did not specifically authorize such a suit, but § 15 of the Act made it unlawful negligently to sink a vessel in navigable waters and imposed a duty on the owner to remove it. *Id.* at 197. The Court stated that allowing the government to sue for its expenses when the owner refused to remove the barge was consistent with the overall purposes of the statute and avoided an unfair windfall to the owner. *Id.* at 201–04.

63. *See supra* notes 41–42 and accompanying text.

64. For example, in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), the Court held that a provision of the Federal Power Act requiring utilities to charge just and reasonable rates "creates no right which courts may enforce." *Id.* at 251. The parties in the case were power companies, and one charged the other with fraud in rate setting that occurred when the companies had an interlocking directorate. *See id.* at 247–48. The district court found the rates unreasonable, determined what would have been reasonable rates, and gave judgment for the difference. *See id.* at 248. The U.S. Supreme Court stated the district court was wrong "to regard

gressional intent.[65] But such cases did not purport to change the governing standards or to identify a cause of action as a separate component of the rights-remedies equation.

B. The Modern Standards

The late 1960s were the final days of the traditional standards. The Court made radical changes in the years that followed, dividing what previously had been a single, unified inquiry about whether a statute created judicially enforceable obligations into three separate and distinct questions. While traditionally the Court equated rights and remedies and rarely mentioned a cause of action, suddenly the Court sharply differentiated between rights, rights of action, and remedies. Moreover, the Court

---

reasonableness as a justiciable legal right rather than a criterion for administrative application in determining a lawful rate." *Id.* at 251. Any remedy thus lay with the Federal Power Commission, not the courts. *See id.*

This decision evoked a spirited dissent. Justice Frankfurter, writing for himself and three other justices, thought that the traditional rights-remedies standards required a different result. *See id.* at 261–62 (Frankfurter, J., dissenting). He noted that the administrative remedies suggested by the majority were inadequate and that the "aim of Congress would be needlessly aborted if this 'definite statutory prohibition of conduct' did not impose civil liability . . . merely because no judicial relief was explicitly authorized." *Id.* at 262 (Frankfurter, J., dissenting). He strongly reaffirmed the traditional standards:

> Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies to enforce statutory obligations. *Texas & N.O. R. Co. v. Brotherhood of R. & S.S. Clerks*, [281 U.S. 548]; *Virginian R. Co. v. System Federation, No. 40*, [300 U.S. 515 (1937)]; *Deckert v. Independence Shares Corp.*, [311 U.S. 282 (1940)]. A duty declared by Congress does not evaporate for want of a formulated sanction. When Congress has "left the matter at large for judicial determination," our function is to decide what remedies are appropriate in light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations. . . . If civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized. *Texas & Pac. R.R. Co. v. Rigsby*, [241 U.S. 33 (1916)]; *Steele v. Louisville & N.R. Co.*, [323 U.S. 192 (1944)]; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, [323 U.S. 210 (1944)]; . . . .

Id. at 261–62 (Frankfurter, J., dissenting); *see also* T.I.M.E. Inc. v. United States, 359 U.S. 464, 469–72 (1959) (following *Montana-Dakota* approach in declining to imply cause of action for shippers against carriers under Motor Carrier Act and also noting that Congress had twice considered and rejected attempts to amend statute to grant shippers such cause of action).

65. A court generally would not conclude that the legislature intended to preclude a particular remedy unless it explicitly so stated. *See, e.g.*, Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) ("Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command."); Hecht v. Bowles, 321 U.S. 321, 329–30 (1944) ("[I]f Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.").

soon adopted separate criteria to decide whether a statute should be read to create a right, imply a cause of action, or provide a remedy.

Two cases in the mid-1970s signaled that change was afoot. In *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*[66] and *Securities Investor Protection Corp. v. Barbour*,[67] the Court focused solely on whether a private right of action in favor of the plaintiffs could be inferred from the statute involved.[68] In *National Railroad Passenger Corp.*, plaintiffs sought to enjoin discontinuance of certain passenger trains, claiming that procedures required by the Rail Passenger Service Act of 1970 had not been followed before terminating service.[69] In *Barbour*, some customers of a broker-dealer sought to compel the Securities Investor Protection Corporation (SIPC) to exercise its statutory authority for their benefit.[70] In both cases, the Court ultimately refused to imply a private right of action because plaintiffs' suits might actually block achievement of the statutory goals.[71] While this problem would likely have caused the Court to deny relief under

66. 414 U.S. 453 (1974).

67. 421 U.S. 412 (1975).

68. *Nat'l R.R. Passenger Corp.*, 414 U.S. at 456. The Court stated:

> [T]he threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party such as the respondent can enforce duties and obligations imposed by the Act; for it is only if such a right of action exists that we need consider [standing and jurisdiction].

Id. at 456; *see also Barbour*, 421 U.S. at 413–14 ("The question presented by this case is whether such customers have an implied private right of action under the Securities Investor Protection Act . . . to compel [Securities Investor Protection Corporation (SIPC)] to exercise its statutory authority for their benefit.").

69. *Nat'l R.R. Passenger Corp.*, 414 U.S. at 455 n.3.

70. *Barbour*, 421 U.S. at 413–14.

71. The legislative history of the Rail Passenger Service Act showed that Congress considered and specifically rejected a provision that would have permitted suit to enforce the Act's provisions "by 'any person adversely affected or aggrieved.'" *Nat'l R.R. Passenger Corp.*, 414 U.S. at 460–61 (quoting *Supplemental Hearings on H.R. 17849 and S. 3706 before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong. 85 (1970) (statement of Secretary of Transportation)). Moreover, Congress believed that "in order to achieve economic viability in a basic rail passenger system," it was necessary to pare uneconomic routes. *Id.* at 461. If suits could be brought all over the country to block discontinuance, with injunctions *pendente lite*, this could frustrate or at least severely delay passenger train discontinuance, with possible dire economic consequences. *Id.* at 463–64. Similarly, in *Barbour* the Court thought that "the overall structure and purpose of the SIPC scheme are incompatible with such an implied right." 421 U.S. at 421. Intervention of SIPC in the affairs of a brokerage house was likely to put the house out of business by driving away current customers and other brokers. *Id.* at 422–23. SIPC thus treats an application for appointment of a receiver and liquidation of a firm as a last resort. *Id.* at 421. The Court feared that customers could not be expected to consider the public interest in timing their decision to apply to the courts. *Id.* at 422.

traditional standards,[72] the singular focus on implication of a private right of action was new.

The Court reaffirmed the separate status of a cause of action in *Cort v. Ash*[73] and set forth four criteria federal courts should use to decide whether to imply a private right of action from a federal statute.[74] Plaintiff Ash, a stockholder in Bethlehem Steel Corporation, contended that the management of the company had authorized use of corporate funds for political advertisements in the 1972 presidential campaign in violation of a federal criminal statute.[75] Ash sought injunctive relief against further expenditures and damages in favor of the corporation.[76] "[T]he principal issue presented for decision," the Court stated, "is whether a private cause of action for damages against corporate directors is to be implied in favor of a corporate stockholder under [the criminal statute]."[77] The Court presented the following four criteria for deciding that question:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co. v. Rigsby* . . . (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? *See, e.g., National Railroad Passenger Corp. v. National Assn. Of Railroad Passengers* . . . (*Amtrak*). Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? *See, e.g., Amtrak, supra, Securities Investor Protection Corp. v. Barbour* . . . . And finally is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? . . . *cf. J. I. Case Co. v. Borak*. . . .[78]

---

72. *See supra* notes 64–65 and accompanying text.
73. 422 U.S. 66 (1975).
74. *Id.* at 78.
75. *Id.* at 71–72.
76. *Id.*
77. *Id.* at 68.
78. *Id.* at 78. (citing Sec. Investor Prot. Corp. v. Barbour, 421 U.S. 412, 423 (1975); Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); J.I. Case Co. v. Borak, 377 U.S. 426, 434 (1964); Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916)).

Most commentators saw *Cort* not as effecting a major change in the law, but as an attempt to consolidate and harmonize precedent.[79] But the significance of *Cort* depends on how one looks at precedent. If one accepts the Court's implicit characterization of several hundred years of decisions as implied right of action cases, then *Cort* makes little change. But if one sees *Cort* as a major step in the separation of rights, rights of action, and remedies, then *Cort* makes a very large change indeed. Until *Cort* (and *National Railroad Passenger Corporation* and *Barbour*), the Court had never identified a cause of action as a separate and essential entity connecting a right and a remedy. *Cort* thus began a radical reconceptualization of the rights-remedies equation.[80]

Davis v. Passman[81] explicitly confirmed that the Court henceforth would consider rights, causes of action, and remedies as "analytically distinct."[82] Ms. Davis asserted that Congressman Otto Passman had discriminated against her on the basis of sex in violation of the Fifth Amendment.[83] Congressman Passman countered that the Fifth Amend-

79. *See, e.g.*, Ashford, *supra* note 6, at 242 ("In articulating and applying each of the four factors . . . the Court was careful to provide specific precedents . . . and said nothing to indicate that it regarded its analysis as a departure from its previous approach or precedents."); George D. Brown, *Of Activism and* Erie*—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 630 (1984) ("Unless Justice Brennan was trying to sandbag the whole concept of implied rights, the four factors ought to be taken for what he says they are: a distillation of prior case law to aid 'in determining whether a private remedy is implicit in a statute not expressly providing one.'") (citations omitted); Frankel, *supra* note 6, at 559 ("[*Cort*] attempt[ed] to assemble sixty years of case law relating to the implication of private remedies into a harmonious whole."). I must admit taking the same view myself. *See* Zeigler, *supra* note 6, at 709 n.233 ("My own view is that *Cort* did not represent a major departure from prior law. The first three factors focus on different aspects of legislative intent that were considered by courts, at least implicitly, as early as *Couch v. Steel*."). I did (and still do) agree with Thomas Hazen that the fourth factor—the federalism factor—is new. *Cf.* Hazen, *supra* note 6, at 1359. U.S. Supreme Court Justices have also disagreed about the significance of *Cort*. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982), Justice Stevens stated that *Cort* modified the traditional approach by shifting the focus primarily to the intent of Congress in enacting the statute. *Id.* at 377. By contrast, in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), Justice Powell characterized the four-factor analysis of that case as "an open invitation to federal courts to legislate causes of action not authorized by Congress." *Id.* at 731 (Powell, J., dissenting).

80. In the years immediately following *Cort*, the justices conducted a *Cort* analysis in several cases, thus reaffirming that they considered a cause of action to be a separate and critical part of the rights-remedies equation. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 316–17 (1979); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59–72 (1978); Piper v. Chris-Craft Indus., 430 U.S. 1, 37–41 (1977).

81. 442 U.S. 228 (1979).

82. *Id.* at 239.

83. Ms. Davis's claim on the merits was quite compelling because Congressman Passman sent her a letter telling her he was firing her because she was a woman. *See id.* at 230 n.3.

ment did not provide a private right of action.[84] The court of appeals agreed with Passman based on a *Cort* analysis and affirmed dismissal of the suit.[85] The U.S. Supreme Court reversed, holding that *Cort*, with its heavy emphasis on legislative intent, did not provide the proper standard for deciding whether a cause of action should be implied from the Constitution.[86] But the Court took pains to distinguish rights, causes of action, and remedies. After concluding that the plaintiff "assert[ed] a constitutionally protected right,"[87] the Court went on to differentiate a cause of action and a remedy:

> [*C*]*ause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all . . . .[88]

Davis thus cemented the trifurcation of rights, rights of action, and remedies.[89]

In the years following *Davis*, the Court continued to treat rights, rights of action, and remedies as distinct, and to develop different criteria for each of the three parts of the new rights-remedies equation. The next section briefly reviews the Court's developing doctrine for all three parts, beginning with implication of private rights of action.

1. Rights of Action

Cort v. Ash itself soon came under attack by a Court increasingly hostile to judicial enforcement of federal statutory rights unless enforcement was explicitly authorized by Congress. In *Touche Ross &*

---

84. *Id.* at 232.
85. *Id.* at 232–33.
86. *Id.* at 239–40.
87. *Id.* at 234.
88. *Id.* at 239 n.18. The Court also distinguished between the meaning of a cause of action in the rights context and in the pleading context. While a cause of action connects a right to a remedy, in pleadings a cause of action "refer[s] roughly to the alleged invasion of 'recognized legal rights' upon which a litigant bases his claim for relief." *Id.* at 237 (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 693 (1949)).
89. For good measure, the Court identified two other distinct questions: "[*J*]*urisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case . . . ; *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy . . . ." *Id.* at 239 n.18.

Co. v. Redington Trustee[90] and *Transamerica Mortgage Advisors, Inc. v. Lewis*,[91] the Court abruptly elevated the second *Cort* criterion—whether Congress intended to create a private right of action—and downplayed the other three criteria. In *Touche Ross*, the Court refused to imply a private right of action under § 17(a) of the Securities Exchange Act of 1934 on behalf of brokerage firm customers against accountants who conducted a faulty audit of the firm's records.[92] The Court stated that "our task is limited *solely* to determining whether Congress intended to create the private right of action asserted" by the plaintiffs.[93] The Court explicitly stated that the four *Cort* factors are not of equal weight and refused to consider plaintiffs' argument that the third and fourth *Cort* factors favored implication, stating that "such inquiries have little relevance to the decision of this case."[94] *Transamerica* echoed *Touche Ross*: "[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear.... We accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us."[95]

In the years following *Touche Ross* and *Transamerica*, the Justices bickered about whether *Cort v. Ash* retained any vitality. *Cort* became like a ghost attempting to regain solid form, appearing relatively substantial in one case only to fade to transparency in the next. Between April and June of 1981, the Court tried five times to define *Cort*'s status without reaching agreement, and while all of the Justices appeared to concede that congressional intent was now the key factor, the other *Cort* factors were given a large role in some cases and barely mentioned in others.[96] In *Daily Income Fund, Inc. v. Fox*[97] and *Massachusetts Mutual*

90. 442 U.S. 560 (1979).

91. 444 U.S. 11 (1979).

92. *See Touche Ross*, 442 U.S. at 570.

93. *Id.* at 568 (emphasis added).

94. *Id.* at 575.

95. *Transamerica*, 444 U.S. at 15–16 (citing *Touche Ross*, 442 U.S. at 568).

96. In *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981), the Court stated that to determine the ultimate question of whether Congress intended to create a private right of action, it would consider three factors set forth in *Cort v. Ash*, 422 U.S. 66 (1975), that it had traditionally relied upon in determining legislative intent: the language and focus of the statute, its legislative history, and its purpose. *Univs. Research Ass'n*, 450 U.S. at 770 (citing *Touche Ross*, 442 U.S. at 575–76). This language suggested that the Court would use the disfavored *Cort* factors to help discern the answer to the favored factor: whether Congress intended to create the private right of action. The Court's language, however, is at best a very vague statement of the *Cort* factors. The fourth factor—whether the cause of action is one traditionally relegated to state law—is not mentioned at all. The Court subsequently indicated that it would not consider the fourth factor in this case. *Id.* at 770 n.21. In the Court's second attempt to clarify *Cort*'s status, the Court restated the

Life Insurance Co. v. Russell,[98] both decided several terms later, the Court acknowledged that congressional intent is the main focus, but then proceeded to conduct a full-blown four-factor analysis.[99] Justice Marshall made a Herculean attempt to harmonize all of these cases in *Thompson v.*

---

factors in yet another form. In *Northwest Airlines, Inc. v. Transportation Workers Union*, 451 U.S. 77 (1981), the Court stated:

> The ultimate question . . . is whether Congress intended to create the private remedy . . . . Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies.

Id. at 91.

Cort emerged in somewhat more solid form in *California v. Sierra Club*, 451 U.S. 287 (1981). Speaking for the majority and quoting his own dissenting opinion in *Transamerica*, Justice White said that *Cort* provided a "'preferred approach for determining whether a private right of action should be implied from a federal statute.'" *Id.* at 292 (quoting *Transamerica*, 444 U.S. at 26 (White, J., dissenting)). He then listed the four factors accurately and completely and stated that they remained "the criteria through which" the intent of Congress to create a private right of action "could be discerned." *Id.* at 293 (citing Davis v. Passman, 442 U.S. 228, 241 (1979)). This was too much for Justice Rehnquist who, joined by Chief Justice Burger and Justices Stewart and Powell, wrote a separate concurrence to complain that "the Court's opinion places somewhat more emphasis on *Cort v. Ash* . . . than is warranted in light of several more recent 'implied right of action' decisions which limit it." *Id.* at 302 (Rehnquist, J., concurring). Justice Rehnquist continued:

> These decisions make clear that the so-called *Cort* factors are merely guides in the central task of ascertaining legislative intent . . . that they are not of equal weight . . . and that in deciding an implied right of action case courts need not mechanically trudge through all four of the factors when the dispositive question of legislative intent has been resolved.

Id. (Rehnquist, J., concurring). *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), made only brief reference to the issue, stating that the focus is on the intent of Congress and that the other *Cort* factors are used to discern intent. *Id.* at 639. Justice Powell, a vehement opponent of implied rights of action, *see* Cannon v. Univ. of Chi., 441 U.S. 677, 730–49 (1979) (Powell, J., dissenting), got the final word of the 1980 term in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). The opinion focused on the narrow question of whether Congress "intended to authorize by implication additional judicial remedies for private citizens," *id.* at 14, and pointed to the statutory language, legislative history, "and other traditional aids of statutory interpretation to determine congressional intent" without mentioning either *Cort* or the four factors, *id.* at 13.

97. 464 U.S. 523 (1984).

98. 473 U.S. 134 (1985).

99. *Id.* at 145–48; *Daily Income Fund*, 464 U.S. at 535–42. The Court also occasionally slips the issue of what current law is by focusing on "the state of the law at the time the legislation was enacted." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378 (1982). If the statute was enacted at a time when the Court applied the traditional standards for determining whether a statutory right could be judicially enforced, the Court is likely to imply a private right of action, reasoning that the Congress that enacted the statute would have expected the Court to do so. *See, e.g.*, Morse v. Republican Party, 517 U.S. 186, 230–31 (1996) (implying private right of action under Voting Rights Act because it was passed at time when Court applied "highly liberal standard for finding private remedies"); *Merrill Lynch*, 456 U.S. at 378–82 (continuing to recognize private right of action under reenacted statutory provision when private right of action had been implied under earlier provision).

Thompson.[100] His language cannot be summarized or paraphrased, but must be quoted:

> In determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute. As guides to discerning that intent, we have relied on the four factors set out in *Cort v. Ash* . . . along with other tools of statutory construction. *See Daily Income Fund, Inc. v. Fox* . . . *California v. Sierra Club* . . . *Touche Ross & Co. v. Redington* . . . . Our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action. Rather, as an *implied* cause of action doctrine suggests, "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Cannon v. University of Chicago* . . . . We therefore have recognized that Congress' "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors, Inc. v. Lewis* . . . . The intent of Congress remains the ultimate issue, however, and "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc. v. Transport Workers* . . . .[101]

---

100. 484 U.S. 174 (1988). Justice Marshall spoke for himself and Justices Rehnquist, Brennan, White, Blackmun, and Stevens.

101. *Id.* at 179 (citing *Daily Income Fund*, 464 U.S. at 535–36; *Northwest Airlines*, 451 U.S. at 94; California v. Sierra Club, 451 U.S. 287, 293 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979); Touch Ross & Co. v. Redington, 442 U.S. 560, 575–76 (1979); Cannon v. Univ. of Chi., 441 U.S. 677, 694, (1979); Cort v. Ash, 422 U.S. 66, 78 (1975)). Justice Scalia erupted: "[T]he Court is not being faithful to current doctrine in its dicta denying the necessity of an actual congressional intent to create a private right of action, and in referring to *Cort v. Ash* . . . as though its analysis had not been effectively overruled by our later opinions." *Id.* at 188 (Scalia, J., concurring). He continued: "I am at a loss to imagine what congressional intent to create a private right of action might mean, if it does not mean that Congress had in mind the creation of a private right of action." *Id.* (Scalia, J., concurring). He also accused the Court of conveying "a misleading impression of current law when it proceeds to examine the 'context' of the legislation for indication of intent . . . ." *Id.* at 189 (Scalia, J., concurring). Justice O'Connor joined this part of Justice Scalia's opinion, but not the final part where he suggested that "we should get out of the business of implied private rights of action altogether." *Id.* at 192 (O'Connor, J., concurring).

Recently, Justice Kennedy acknowledged that "[t]he Court has encountered great difficulty in establishing standards for deciding when to imply a private cause of action under a federal statute which is silent on the subject."[102] While the standards are unclear, the results are not. By definition in these cases, the statute in question does not expressly create the cause of action the plaintiff wishes to employ. The legislative history is usually silent about whether Congress meant to create a private right of action. Thus, requiring clear evidence of congressional intent to create a private right of action ensures that few will be found.[103] The Court rarely acknowledges the broader implications of its restrictive implication doctrine because it chooses to treat a cause of action as a separate procedural entity, apart from rights and remedies.[104] But whether the Court acknowledges it or not, no right of action also means no right and no remedy.[105]

2. *Rights*

Whether a statute confers definable rights and duties is the logical starting point for any application of the rights-remedies principles. Traditionally, courts analyzed the issue in a facially intelligible way as a part of single, unified inquiry. Thus, the statute in *Ashby v. White* guaranteeing the right to vote plainly gave a right to vote to a qualified voter;[106] the statute in *Couch v. Steel* requiring adequate medicines on board ship gave a right to seamen to have those medicines in place;[107] the statute in *Rigsby* requiring secure handholds on trains gave train workers a right to have solid, not defective, handholds on the trains.[108] The traditional approach was summed up in the RESTATEMENT OF TORTS: a statute conferred a right as long as it was intended for the benefit of the class of persons of which the plaintiff was a member, and the harm suffered was of a kind that the statute generally was intended to prevent.[109]

---

102. Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 656 (1999) (Kennedy, J., dissenting).

103. *Thompson*, 484 U.S. at 190 (Scalia, J., concurring) (pointing out that Court rejected claims of implied right of action in nine of eleven recent cases). For a listing of recent lower court decisions denying private rights of action, see Stabile, *supra* note 6, at 870 n.54.

104. *See supra* notes 66–89.

105. *See infra* notes 223–28 and accompanying text.

106. *See supra* notes 21–23 and accompanying text.

107. *See supra* note 23.

108. *See supra* notes 43–51 and accompanying text.

109. *See supra* note 36 and accompanying text.

Maine v. Thiboutot[110] precipitated the U.S. Supreme Court's recent focus on rights as a separate part of the rights-remedies equation. *Thiboutot* held that 42 U.S.C. § 1983 encompasses claims against state and local officials for federal *statutory* violations as well as for federal constitutional violations.[111] This holding suggested that state or local officials could be sued in federal court for the violation of any federal law[112] and raised the specter of an avalanche of new cases.[113] Because § 1983 provided an explicit, all-purpose cause of action, to avoid the specter of a flood of new litigation, the Court had to find new ways to limit the right and remedy parts of the right/right of action/remedy triad.

The Court took the first step to limit rights in *Pennhurst State School & Hospital v. Halderman.*[114] The plaintiff was a resident of Pennhurst, a Pennsylvania facility housing the mentally retarded.[115] She brought a class action alleging that the "unsanitary, inhumane, and dangerous" conditions at Pennhurst violated, inter alia, § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act.[116] She sought injunctive and monetary relief and asked that Pennhurst be closed and that "community living arrangements" be made for the residents.[117] The Court concluded that the § 6010 conferred no rights on the plaintiffs and thus denied relief.[118]

On its face, § 6010 appears to confer rights on persons like the plaintiffs in *Pennhurst.* Section 6010 is entitled a "bill of rights" provision, and states that "Congress makes the following findings," including that "[p]ersons with developmental disabilities have a right to appropriate treatment, services, and habilitation" which "should be provided in the setting that is least restrictive of the person's personal liberty."[119] The Court nullified this seemingly straightforward language

110. 448 U.S. 1 (1980).

111. *See id.* at 4.

112. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 527 (3d ed. 1999); Sunstein, *supra* note 6, at 394.

113. *See Thiboutot*, 448 U.S. at 22–23 (Powell, J., dissenting) (asserting that "[n]o one can predict the extent to which litigation arising from today's decision will harass state and local officials; nor can one foresee the number of new filings" under literally hundreds of cooperative federal-state programs enacted by Congress).

114. 451 U.S. 1 (1980). The Court also quickly moved to limit remedies in § 1983 cases. *See infra* notes 149–60 and accompanying text.

115. *Pennhurst*, 451 U.S. at 5.

116. *Id.* at 6.

117. *Id.*

118. *Id.* at 11, 31. Ultimately the Court remanded the case for consideration of other claims raised by the plaintiffs. *Id.* at 30–31.

119. *Id.* at 13.

in several steps. The Court identified the issue as whether Congress intended § 6010 to create enforceable rights[120] and then set forth some general guidelines to discern intent. First, the Court said that the case for inferring intent "is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States."[121] Second, the Court established a "clear statement" requirement for statutes, like the Act in *Pennhurst*, enacted pursuant to Congress's spending power.[122] While Congress can fix the terms on which it will disburse federal money to the states, such legislation is like a contract.[123] For a state to voluntarily and knowingly accept the terms of the contract, the terms must be very clear.[124] Thus, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[125]

With these two principles in place, the Court turned to § 6010 and stated that it found nothing in the Act or in the legislative history to suggest that Congress meant to impose on the States the cost of providing appropriate treatment in the least restrictive setting for mentally retarded citizens.[126] Because § 6010 only made a "finding" that persons with developmental disabilities have a right to treatment and habilitation in a least restrictive setting, it did not actually create the rights and obligations that plaintiffs claimed.[127] After reviewing the legislative history, the Court concluded that the provisions of § 6010 "were intended to be hortatory, not mandatory."[128] As for the clear statement rule, the Court held that the phrases "appropriate treatment" and "least restrictive setting" were ambiguous, and thus did not provide sufficiently clear notice to the states of their obligations in exchange for the federal money.[129]

The Court refined the criteria for deciding whether a statute creates a right in subsequent cases. In *Wright v. City of Roanoke Redevelopment &*

120. *See id.* at 15.

121. *Id.* at 16–17.

122. *See id.* at 17. The spending power is contained in article I, section 8, clause 1 of the Constitution, which reads "Congress shall have Power to . . . provide for the . . . general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1; Suter v. Artist M., 503 U.S. 347, 356 n.7 (1992).

123. *Pennhurst*, 451 U.S. at 17.

124. *Id.*

125. *Id.*

126. *Id.* at 18.

127. *Id.* at 18–19.

128. *Id.* at 24.

129. *See id.* at 24–25.

Housing Authority,[130] plaintiffs claimed that the Housing Authority overbilled them for utilities in violation of the Brooke Amendment to the United States Housing Act of 1937.[131] The Amendment limited rent paid by low-income families, including utilities, to thirty percent of their income.[132] The Court held that the Brooke Amendment gave the tenants rights because the thirty percent limit was a mandatory provision intended to benefit the tenants.[133] Moreover, the Housing and Urban Development (HUD) regulations requiring that a "reasonable" amount for utilities be included in the rent payment were not "too vague and amorphous" or "beyond the competence of the judiciary to enforce."[134] This reasoning suggested a three-part test that the Court subsequently articulated in *Golden State Transit Corp. v. City of Los Angeles*:[135]

> In deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment." *Pennhurst* . . . . The interest the plaintiff asserts must not be "too vague and amorphous" to be "beyond the competence of the judiciary to enforce." *Wright* . . . . We have also asked whether the provision in question was "intend[ed] to benefit" the putative plaintiff. *Id.*[136]

The Court has continued to apply the three-part *Golden State* test in recent years, sometimes finding that a statute creates an enforceable right,[137] and sometimes not.[138] The Court also has continued to treat the

130. 479 U.S. 418 (1987).

131. *Id.* at 419.

132. *Id.* at 420–22.

133. *Id.* at 429–30.

134. *Id.* at 431–32.

135. 493 U.S. 103 (1989).

136. *Id.* at 106 (quoting *Wright*, 479 U.S. at 431–32; Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 19 (1981)). *Golden State* arose from a labor dispute between the transit corporation and its union. The City of Los Angeles conditioned renewal of the transit corporation's taxi franchise on settlement of the dispute. *Id.* at 104. In an earlier ruling, the Court held that the City had violated federal labor law by taking this action. *See* Golden State Transit Corp. v. City of L.A., 475 U.S. 608, 618–19 (1986). On remand the district court ordered the city to reinstate the franchise but declined to award damages under § 1983; the court of appeals affirmed. *Id.* at 104–05. Applying the criteria set forth in the quotation above, the U.S. Supreme Court held that the corporation was "the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process." *Id.* The Court also held "that the NLRA [National Labor Relations Act] gives it rights enforceable against governmental interference in an action under § 1983," *id.* at 109, and remanded the case for further proceedings, *id.* at 113.

137. *See, e.g.*, Lividas v. Bradshaw, 512 U.S. 107, 132–33 (1994) (concluding that action by California Commissioner of Labor violated plaintiff's rights under NLRA); Wilder v. Va. Hosp.

question of whether a statute confers a right as analytically distinct from the question of whether a private right of action should be implied.[139]

3. *Remedies*

After separating rights, rights of action, and remedies, the Court developed separate, relatively restrictive criteria for deciding whether a statute creates a right and whether to imply a right of action from a statute. The record regarding remedies is more mixed. While recent U.S. Supreme Court decisions articulate many reasons for limiting or denying remedies, the Court has on occasion reaffirmed its broad remedial powers. The Court may be hesitant to restrict its power to order an effective remedy when it believes circumstances warrant full relief.

Traditionally, courts were willing to make available all appropriate remedies to enforce rights.[140] Most modern cases, by contrast, are ringed about with reservations.[141] The Court developed several limitations on

---

Ass'n, 496 U.S. 498, 509–10 (1990) (holding that Medicaid Act gave Virginia health care provider right to state medical plan that provided rates of payment that are reasonable and adequate to meet costs incurred by efficiently operated facility).

138. *See, e.g.*, Blessing v. Freestone, 520 U.S. 329, 341–42 (1997) (holding that Title IV-D of Social Security Act, which required states to take adequate steps to obtain child support payments from fathers of children, did not confer enforceable rights on custodial parents); Suter v. Artist M., 503 U.S. 347, 363 (1992) (holding that provision of Adoption Assistance and Child Welfare Act of 1980, requiring states to have plan providing that reasonable efforts will be made to keep children out of foster care, did not confer any rights on foster children).

139. The Court occasionally notes the interplay of the two questions, while treating them as separate inquiries. For example, in *Suter*, the district court and court of appeals both found that the statutory provisions in question could be enforced under § 1983 and by means of an implied right of action. *Suter*, 503 U.S. at 353–54. The U.S. Supreme Court first concluded that the statutory provisions did not create an enforceable right, and then separately and summarily concluded that if Congress had not meant to create an enforceable right, there was nothing to create a cause of action to enforce. *Id.* at 363–64. *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), sparked a disagreement among the Justices about the relationship between rights and rights of action. The majority considered them to be separate, *id.* at 508 n.9, while the dissent sought to equate the question "Does the statute create a right?" with the first *Cort* criterion, *id.* at 525 (Rehnquist, C.J., dissenting). *Wilder* is discussed at *infra* notes 241–57 and accompanying text.

140. *See supra* Part I.A.

141. The Court signaled that it would be somewhat more restrictive in granting equitable remedies in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). The restrictions were not all new; some merely restated traditional limits or preconditions. *Id.* at 311–13. But by compiling lists of limitations, and adding some new limits for good measure, the Court implicitly suggested that it would follow a more cautious, restrictive approach to equitable remedies. *Id.* In *Weinberger*, residents of Puerto Rico sued to enjoin the Navy from using Vieques, a small island off Puerto Rico's coast, for target practice. *See id.* at 307. The plaintiffs claimed that discharging ordnance into the water around the island without first obtaining a permit from the Environmental Protection Agency violated several federal laws, including the Federal Water Pollution Control Act. *Id.* at 307–08. The district court refused to issue the injunction, although it did order the Navy to apply for a

remedies in cases where plaintiffs sought damages for violation of constitutional rather than statutory rights. For example, *Davis v. Passman*,[142] the first case stating that rights, rights of action, and remedies are "analytically distinct,"[143] also suggested that damages might be inappropriate for a violation of a constitutional right if: a) there were special factors counseling hesitation, b) the case presented unfocused remedial issues posing difficult questions of valuation or causation, or c) allowing damages would result in a flood of new cases.[144]

The Court found special factors counseling hesitation in two cases brought by enlisted military personnel claiming constitutional violations by superior officers.[145] The Court refused a damage remedy in both cases because it did not want to interfere with military discipline or Congress's

---

permit. *Id.* at 309–10. The court of appeals held that the statute required an immediate injunction halting the bombing until a permit was obtained. *Id.* at 310–11. The U.S. Supreme Court reversed and remanded the case for the court of appeals to consider whether the district court abused its discretion in failing to order an injunction. *Id.* at 306, 320. Initially the Court appeared to construe federal equitable powers broadly by stressing the flexibility of equity and need to mold decrees to fit the particular needs of each case. *Id.* at 312. However, the Court then listed reasons why injunctions should be denied. An injunction is not a remedy "which issues as of course" or to deal with trifling matters. *Id.* at 311 (quoting Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334, 337–38 (1933)). An injunction should be denied unless the plaintiff can show irreparable injury and the inadequacy of legal remedies. *Id.* at 312. Finally, "courts of equity should pay particular regard for the public consequences" of ordering an injunction, and deny relief if it might adversely affect the public interest. *Id.* The Court appeared to believe that these principles supported denial of an injunction in this case. *See id.* The Navy's technical violation of the federal statute was not causing any appreciable environmental harm. *Id.* at 307. Thus, the harm might be characterizing as "trifling" rather than "irreparable." Moreover, the national interest might be harmed if the Navy could not use the island to train its gunners. *Id.* at 310. Ultimately, the Court reversed and remanded the case to the court of appeals to determine whether the district court abused its discretion when it declined to issue an injunction. *Id.* at 320.

The controversy over the use of Vieques for target practice continues. *See* Elizabeth Becker, *Puerto Rico Governor Seeks a Ban on Vieques Bombing*, N.Y. TIMES, Jan. 14, 2001, at A18.

142. 442 U.S. 228 (1979).

143. *Id.* at 239; *see also supra* notes 81–89 and accompanying text.

144. *Id.* at 245–48. The Court allowed a damage remedy in *Davis* because none of these conditions were met. *Id.* at 248. Although a suit against a Congressman claiming that he acted unconstitutionally in the course of his duties raised "special concerns counseling hesitation," the Court held the concerns were coextensive with the protections afforded by the Speech and Debate Clause of the Constitution. *Id.* at 246. The Court also believed that "damages would be judicially manageable," *id.* at 245, and did not see the potential for a deluge of new lawsuits, *id.* at 248.

The Court also allowed a damage remedy for violation of the Eighth Amendment prohibition against cruel and unusual punishments, *see* Carlson v. Green, 446 U.S. 14 (1980), but thereafter "responded cautiously to suggestions that [damage] remedies be extended into new contexts," Schweiker v. Chilicky, 487 U.S. 412, 421 (1988).

145. *See generally* United States v. Stanley, 483 U.S. 669 (1987); Chappell v. Wallace, 462 U.S. 296 (1983).

plenary authority over military matters.[146] The Court also found special factors counseling hesitation in two other cases claiming denial of constitutional rights where plaintiffs had obtained substantial relief through administrative remedies, even though the relief was incomplete.[147] In those cases, the Court concluded that the elaborate and carefully thought-out remedial schemes set up by Congress should not be augmented with new remedies created by the judiciary.[148]

The Court used similar reasoning to limit remedies in § 1983 actions against state and local officials for violation of federal statutes, holding that comprehensive statutory remedies raise a presumption that Congress intended to preclude use of § 1983. In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,[149] for example, plaintiffs sued local, state, and federal officials responsible for dumping sewage and other waste into the Atlantic Ocean, claiming that the pollution was causing the "collapse of the fishing, clamming and lobster industries."[150] Plaintiffs claimed, inter alia, that defendants were violating the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act of 1972 and sought declaratory and injunctive relief and damages.[151] The Court first declined to imply a private right of action under the two statutes[152] and then raised on its own the question whether

146. *See Stanley*, 483 U.S. at 681; *Chappell*, 462 U.S. at 304.

147. In *Bush v. Lucas*, 462 U.S. 367 (1983), plaintiff was returned to his job and got back pay for an improper retaliatory demotion, but was unable to obtain attorney's fees or damages for emotional distress and mental anguish. *Id.* at 371–72, 388. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), plaintiffs were eventually restored to disabled status and were awarded full retroactive benefits after being wrongly terminated from a Social Security program, but were unable to obtain damages for emotional distress and other hardships suffered because of the delays in the receipt of their benefits. *See id.* at 425, 428–29.

148. *Schweiker*, 487 U.S. at 428–29; *Bush*, 462 U.S. at 389. Another factor may have made the Court particularly reluctant to grant a damage remedy in *Schweiker*. The lawsuit could be seen as an attempt by the plaintiffs to make an end run around the restrictive standards prevailing in the 1980s for implication of private rights of action from statutes. *Schweiker*, 487 U.S. at 418–19. Plaintiffs alleged that several federal officials and one state official who were "acting under color of federal law" took actions violating the Social Security Act, and that these actions denied them due process of law. *Id.* It was unlikely that a private right of action on their behalf would be implied under the Social Security Act; thus, the request for a remedy directly under the Fifth Amendment provided their only hope for relief (§ 1983 could not be used because the suit was against federal officials). Lawsuits against federal agencies often assert a failure to follow mandated procedures. If all or even many of these actions could be converted into constitutional actions under the Fifth Amendment and proceed on that basis, then the *Touche Ross-Transamerica* restrictions could be circumvented.

149. 453 U.S. 1 (1981).

150. *Id.* at 4–5.

151. *Id.*

152. *Id.* at 11–18. The Court used the *Touche Ross-Transamerica* standards, *see supra* notes 90–95 and accompanying text, that focus on whether Congress intended to create a private right of

§ 1983 might provide plaintiffs with an alternate source of congressional authorization to sue.[153] It quickly answered the question in the negative, stating that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."[154] The Court found it "hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions."[155] Consequently, it held that § 1983 was unavailable.[156]

The Court reaffirmed this new limitation on judicial remedies in subsequent § 1983 cases. In *Smith v. Robinson*[157] the Court held that Congress intended the comprehensive procedures and guarantees authorized in the Education of the Handicapped Act to be the exclusive means by which a handicapped child could raise an equal protection claim and that § 1983 could not be used.[158] On the other hand, *Wright v. City of Roanoke Redevelopment & Housing Authority*[159] made it somewhat easier to enforce federal statutes through § 1983 by placing the burden on the defendant state or local officials to demonstrate that Congress intended to foreclose § 1983 actions, and by holding that creation of general administrative remedies or fund cut-off procedures would not ordinarily suffice to show congressional intent to preclude use of § 1983.[160]

---

action. *Sea Clammers*, 453 U.S. at 14. Since the Acts contained elaborate enforcement mechanisms that conferred authority to sue on both government officials and private citizens, the Court concluded that Congress did not intend "to authorize by implication additional judicial remedies for private citizens." *Id.*

153. *Id.* at 19.

154. *Id.* at 20.

155. *Id.*

156. *Id.* at 21.

157. 468 U.S. 992 (1984).

158. *Id.* at 1011–12.

159. 479 U.S. 418 (1987).

160. *Id.* at 427–28. The Court noted that in both *Sea Clammers* and *Smith v. Robinson* the statutes involved provided for some private judicial enforcement, thus evidencing an intent to supplant § 1983. *Id.* at 427. The statute at issue in *Wright*, by contrast, had no such provisions. *Id.*; *see also* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 520–23 (1990) (holding that defendants had not carried their burden of showing that Medicaid Act contained comprehensive remedial scheme because Act contained no provisions for private judicial or administrative enforcement and fund cut-off mechanism was not sufficient to foreclose reliance on § 1983).

The Court has continued to reaffirm the "comprehensive remedial scheme" exception to the use of § 1983 in recent years. *See* Blessing v. Freestone, 520 U.S. 329, 341 (1997) (stating that Congress can specifically foreclose § 1983 remedy "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."); Livadas v. Bradshaw, 512 U.S. 107, 133 (1994) (same).

Given the relatively restrictive remedies decisions in the 1970s and 1980s, it was a surprise in 1992 when the Court appeared to reaffirm the traditional generous remedial principles. *Franklin v. Gwinnett County Public Schools*[161] accomplished this result by sharply distinguishing between rights, rights of action, and remedies,[162] and by holding that the restrictive standards for creating rights and implying rights of action do not apply to remedies.[163] In *Franklin*, plaintiff alleged that a high school teacher subjected her to continual sexual harassment and "coercive intercourse."[164] She alleged that other teachers and administrators knew about this conduct and about similar incidents with other students but did nothing.[165] The offending teacher finally resigned on the condition that the matter be dropped, and the school closed its investigation.[166] Ms. Franklin brought suit under Title IX of the Education Amendments of 1972.[167] The district court dismissed the complaint on the ground that Title IX does not authorize a damage award, and the court of appeals affirmed.[168]

The U.S. Supreme Court began by reaffirming the decision in *Cannon v. University of Chicago*,[169] which held that Title IX was enforceable through a private right of action.[170] The Court then carefully distinguished the issue presented by *Franklin*, stating that "in this case we must decide what remedies are available in a suit brought pursuant to this implied right."[171] The Court reiterated that "the question of what remedies are available under a statute that provides a private right of action is analytically distinct from the question of whether a private right of action exists in the first place."[172] Thus, the implied right of action cases cited by the defendants with their emphasis on whether Congress

161. 503 U.S. 60 (1992).
162. *Id.* at 65–66.
163. *Id.* at 66.
164. *Id.* at 63.
165. *Id.* at 64.
166. *Id.*
167. *Id.* The pertinent portion of Title IX reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (1994).
168. *See Franklin*, 503 U.S. at 64.
169. 441 U.S. 677 (1979).
170. *Franklin*, 503 U.S. at 65.
171. *Id.*
172. *Id.* at 65–66 (citing Davis v. Passman, 442 U.S. 228, 239 (1979)). *Davis* is discussed *supra* notes 81–89 and accompanying text.

intended to create a private right of action were simply "inapposite."[173] The Court cited many of the venerable cases establishing a reciprocal relation between rights and remedies[174] and stated that once a right and a cause of action are in place, "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise."[175]

The Court found nothing in the legislative history of Title IX, which was enacted when the traditional norms were firmly in place, to indicate that Congress would not want a damage remedy for violation of Title IX.[176] Moreover, any limitation that might flow from the fact that Title IX was enacted pursuant to the Spending Clause did not apply because the plaintiff alleged an intentional violation of the statute.[177] Finally, the Court rejected the suggestion that relief under Title IX should be limited to back pay and prospective relief.[178] Ms. Franklin would take nothing from either remedy. Ms. Franklin was a student, not a teacher; the offending teacher no longer taught at the school, and she was no longer a student there.[179]

The Court recently retreated from its liberal statements of *Franklin* in *Gebser v. Lago Vista Independent School District*[180] and *Davis v. Monroe County Board of Education*.[181] Both cases limit the scope of the damage remedy available against a school district under Title IX and reaffirm that the Court considers rights, rights of action, and remedies to be distinct. Ms. Gebser had a sexual relationship with a teacher at her school but did not report the relationship to school officials.[182] Subsequently, the parents of two other girls complained to the principal about comments the teacher made in class, and the teacher was cautioned to be careful in the future.[183] A few months later a police officer

173. *Franklin*, 503 U.S. at 69 n.6.

174. The Court cited *Bell v. Hood*, 327 U.S. 678 (1946), *Texas & Pacific Railroad Co. v. Rigsby*, 241 U.S. 33 (1916), *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838), *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), *Ashby v. White*, 92 Eng. Rep. 126 (K.B. 1703), and many other traditional cases. *Franklin*, 503 U.S. at 66–69.

175. *Franklin*, 503 U.S. at 66. The Court asserted that "[t]his principle has deep roots in our jurisprudence." *Id.*

176. *Id.* at 71–73.

177. *Id.* at 74–75. The Court believed that the school district plainly was on notice that Title IX prohibits discrimination on the basis of sex and that countenancing the teacher's conduct amounted to a knowing violation of Title IX. *Id.*

178. *Id.* at 75–76.

179. *Id.* at 76.

180. 524 U.S. 274 (1998).

181. 526 U.S. 629 (1999).

182. *Gebser*, 524 U.S. at 277–78.

183. *Id.* at 278.

discovered the plaintiff and the teacher having intercourse and arrested the teacher, who was subsequently fired.[184] Ms. Gebser and her mother filed suit in state court against the school district claiming, inter alia, violation of Title IX.[185] The case was removed to federal court and the Title IX claim was dismissed on the ground that the school district did not have sufficient notice of the teacher's conduct.[186] The court of appeals affirmed.[187]

The U.S. Supreme Court acknowledged that past cases had established each of the three separate elements of the rights-remedies equation in Title IX cases: Students have a right to be free from sexual harassment,[188] an implied private right of action exists,[189] and damages are available in the implied private action.[190] The Court made clear that this case concerned only the scope of the remedy: "We made no effort in *Franklin* to delimit the circumstances in which a damages remedy should lie."[191] Because the cause of action was judicially created, the Court believed that it had "a measure of latitude to shape a sensible remedial scheme that best comports with the statute."[192] The Court then restricted the circumstances in which damages could be recovered. The Court stated that statutory structure and purpose were "pertinent not only to the scope of the implied right [of action], but also to the scope of the available remedies."[193] While the general rule is that federal courts can use all available remedies to vindicate federal rights,[194] the rule must yield "'where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved.'"[195] The plaintiffs argued that the school district should be held to a respondeat superior standard of liability, or at least to a constructive-notice standard, making it liable for damages if officials knew or should have known about harassment

184. *Id.*

185. *Id.* at 278–79.

186. *Id.* at 279.

187. *Id.*

188. *Id.* at 281–82. The Court noted that *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), held that a supervisor discriminates against an employee on the basis of sex when the supervisor sexually harasses the employee and that *Franklin* applied the same rule when a teacher sexually harasses a student. *Gebser*, 524 U.S. at 281–82.

189. *Id.* at 281 (citing Cannon v. Univ. of Chi., 441 U.S. 677 (1979)).

190. *Id.* (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992)).

191. *Id.* at 284.

192. *Id.*

193. *Id.*

194. *Id.* at 284–85.

195. *Id.* at 285 (quoting Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 595 (1983) (White, J.)).

but failed to address it.[196] The Court thought that either of these standards would frustrate the purposes of Title IX. Because Title IX was enacted under the Spending Clause, the Court reasoned that the plaintiffs' proposed standard would improperly result in liability without notice to an "appropriate person" and an opportunity to rectify any violation.[197] To avoid this problem, the Court adopted the following standard of liability:

> We conclude that damages may not be recovered [for the sexual harassment of a student by one of the district's teachers] unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.[198]

The Court's analysis in *Davis v. Monroe County Board of Education*[199] is similar to its analysis in *Gebser*. The issue was whether a school district can be liable for damages under Title IX for the sexual harassment of one student by another.[200] The Court again separated the right, right of action, and remedy, stating that student-on-student sexual harassment can rise to the level of discrimination under Title IX, that a private right of action exists, and that money damages are available.[201] As in *Gebser*, the Court purported to consider only the scope of the remedy.[202] The Court again relied on the Spending Power analysis to restrict the damage remedy. Private damage actions are available "only where recipients of federal funding [have] adequate notice that they could be liable for the conduct in issue."[203] The Court stated that the school district could be liable only for its own misconduct.[204] The school district could only be said to "expose" its students to harassment or "cause" them to undergo it if two conditions were met. First, the school district must exercise "substantial control over both the harasser and the context in which the . . . harassment occurs;"[205] and second, the school district must have actual knowledge of the harassment and be

196. *Id.* at 282–83.
197. *Id.* at 287–88.
198. *Id.* at 277, 290–91.
199. 526 U.S. 629 (1999).
200. *Id.* at 632–33.
201. *Id.* at 639–40.
202. *Id.* at 639 ("[A]t issue here is the question whether a recipient of federal education funding may be liable for damages under Title IX under any circumstances for discrimination in the form of student-on-student sexual harassment.").
203. *Id.* at 640.
204. *Id.*
205. *Id.* at 645.

deliberately indifferent to it.[206] The Court tacked on one further limitation for good measure. To recover damages, a victim of student-on-student sexual harassment must establish "harassment that is so severe, pervasive, and objectively offensive, that it effectively bars the victim's access to an educational opportunity or benefit."[207]

Part I has shown that traditionally courts equated rights and remedies without considering whether the statute in question provided a private right of action. Recently, the Court divided what had previously been a unified inquiry into three separate questions and developed separate, relatively restrictive criteria to decide whether a statute should be read to create a right, imply a right of action, or provide a remedy. Part II of this Article explains why rights, rights of action, and remedies are interrelated[208] and makes the case for development of a single, integrated

---

206. *Id.* at 646–47, 650.

207. *Id.* at 633.

208. Interestingly, there is a group of three cases in which the modern Court recognized the interrelation of rights, rights of action, and remedies. The issue in all three cases was whether a right of contribution existed on behalf of someone found liable under a particular federal statute. The Court seemed uneasy talking about all three elements at the same time, and the discussions are somewhat jumbled.

In *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), the airline sued for contribution from two unions that it claimed were partly to blame for a policy of differential pay for male and female cabin attendants that resulted in a substantial money judgment against the airline in an earlier action. *Id.* at 79–80. The airline claimed that it had an implied cause of action under the Equal Pay Act, or alternately, a federal common law right to contribution. *Id.* at 82. The Court assumed arguendo that all of the elements of a typical contribution claim were established. *Id.* at 88–90. It then made the following statement that appears to recognize the interrelation between the three elements, although the Court did not elaborate:

> None of these assumptions, however, provides a sufficient basis for recognizing the right petitioner is asserting in this proceeding.
>
> That right may have been created in either of two ways. First, it may have been created by statute when Congress enacted the Equal Pay Act or Title VII. Even though Congress did not expressly create a contribution remedy, if its intent to do so may fairly be inferred from either or both statutes, an implied cause of action for contribution could be recognized on the basis of the analysis used in cases such as *Cort v. Ash*, [422 U.S. 68 (1975)] . . . . Second, a cause of action for contribution may have become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct.

Id. at 90. The Court went on to deny the right of contribution. *Id.* at 98–99.

The Court in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), considered whether a defendant found liable in an antitrust case could seek contribution from other participants in the unlawful conspiracy. *Id.* at 632. It is hard to tell from the Court's language whether it is equating the right and the right of action, or simply mixing them up. The Court stated:

> There is no allegation that the antitrust laws expressly establish a right of action for contribution. Nothing in these statutes refers to contribution, and if such a right exists it must be by implication. Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress.

standard for deciding whether a statutory provision should be judicially enforceable.

Id. at 639. The Court concluded Congress did not intend to authorize a right of contribution. *Id.* at 639–40.

Finally, in *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, 508 U.S. 286 (1993), the Court considered whether defendants in a suit based on the implied right of action under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission may seek contribution from joint tortfeasors. *Id.* at 288. Justice Kennedy's opinion for the Court does not present an integrated analysis of rights, rights of action, and remedies. Instead, it hopelessly jumbles them. The problems begin with the question on which certiorari was granted: "'Whether federal courts may imply a private right to contribution in Section 10(b) . . . and Rule 10b-5 . . . .'" *Id.* at 289–90 (quoting petition for writ of certiorari). It is unclear from this statement whether the Court was deciding if it should imply a right or imply a right of action. Although rights, rights of action, and remedies are inextricably related, they are not the same thing. Justice Kennedy made several statements that treated the three parts of the equation as synonymous:

> The private right of action under Rule 10b-5 was implied by the Judiciary on the theory courts should recognize private remedies to supplement federal statutory duties, not on the theory Congress had given unequivocal direction to the courts to do so. . . . Thus, it would be futile to ask whether the 1934 Congress also displayed a clear intent to create a contribution right collateral to the remedy. . . .
>
> [*Touche Ross*, *Transamerica*, and their progeny] caution against the creation of new causes of action. . . . They teach that the creation of new rights ought to be left to legislatures, not courts. . . . [W]hether the right of a tortfeasor to seek contribution from those who share, or ought to share, joint liability is recognized by statute . . . or as a matter of common law, in both instances the right is thought to be a separate or independent cause of action.

Id. at 291–92. The Court ultimately granted a right of contribution in *Musick*. *Id.* at 298.

It is intriguing to ponder why the Court talks of rights, rights of action, and remedies together in *Northwest Airlines*, *Texas Industries*, and *Musick*, while it considers them separately in so many other cases. There are two possible reasons. First, in the contribution cases all three parts of the rights-remedies equation were at issue. The cases are unlike those in the *Thiboutot* line, where § 1983 created a cause of action and the focus was on the "rights" part of the equation, or the recent Title IX cases, where the Court took the right and right of action as established, and focused only on the remedy. Thus, the procedural setting in the contribution cases invited a discussion of all three elements. Second, in the contribution cases, the right is defined in terms of the remedy. The right is a right to a remedy: contribution. This makes it almost impossible to talk about the right and the remedy as separate entities. In most cases the right is not a right to a remedy, but rather a right to have another act or forbear from acting in a particular manner—for example, to tell the truth in a proxy statement, or avoid discriminating on the basis of race—and this facilitates separate discussions of rights and remedies.

Although the discussions in *Northwest Airlines*, *Texas Industries*, and *Musick* are somewhat confused, on the positive side they suggest that the Court might be moving, however haltingly, in the right direction.

II. TOWARD A NEW TEST FOR DECIDING WHETHER A STATUTORY PROVISION SHOULD BE JUDICIALLY ENFORCEABLE

Rights, rights of action, and remedies are inextricably related. A court cannot make a decision about one of them without necessarily affecting the other two. A decision that focuses just on one element without acknowledging the impact on the other two is incomplete and may distort the meaning of the statute in issue and undermine congressional intent. Thus, the Court has been wrong to consider separately whether a statute confers a right, implies a right of action, or authorizes a remedy. All three questions are really part of a single, broader inquiry: Assuming the plaintiff can prove the case, does the applicable statutory provision entitle the plaintiff to the particular judicial remedy he or she seeks? One inquiry should have one test for answering it.

The further questions "what should the test be?" and "how should it be applied?" cannot be answered simply or mechanically. How one answers these questions depends on one's views on such matters as the role of the federal courts in the federal system, separation of powers, the *Erie* doctrine, judicial activism, and on several pragmatic concerns. Part II of this Article groups together positions on these issues to form two general models governing the judicial enforcement of federal statutes. It denotes one model the adversarial model and the other the cooperative model. This sets the stage for Part III of this Article, which seeks to establish a middle ground between the two models.

A. The Case for a Single, Integrated Standard

1. The Interrelation of Rights, Rights of Action, and Remedies

Rights, rights of action, and remedies are interrelated conceptually and practically. The interrelation flows first from the very definitions of the terms. A legal right imposes a correlative duty on another to act or to refrain from acting for the benefit of the person holding the right.[209] From this definition it follows that

> [A] right without a remedy is not a legal right; it is merely a hope or a wish. . . . Unless a duty can be enforced, it is not really a duty; it is only a voluntary obligation that a person can fulfill or not at his whim. In such circumstances, the holder of the correlative "right"

209. *See* Hohfeld, *supra* note 2, at 35–38.

> can only hope that the act or forbearance will occur. Thus, a right without a remedy is simply not a legal right.[210]

Franklin v. Gwinnett County Public Schools[211] illustrates this point. If the plaintiff could not obtain damages from the school district for sexual harassment by a teacher, then the school district had no legal duty to protect her. It could protect her or not as it wished. Thus, without a remedy, plaintiff had no legal right as against the school district to be free of sexual harassment by teachers.

The kind of remedy that one may obtain also defines the scope and meaning of the right. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[212] provides an example. The Fourth Amendment grants people a right "to be secure in their persons [and] houses . . . against unreasonable searches and seizures."[213] Bivens alleged that federal agents violated this right by entering his apartment without a warrant or probable cause, terrorizing his family, searching the entire premises, and using unreasonable force to arrest him.[214] It is unclear from the Court's opinion whether the agents found the narcotics they were searching for, but assume that they did. If Bivens' only remedy was to raise the Fourth Amendment violation in defense of his criminal prosecution, then his Fourth Amendment right meant that Bivens could successfully defend a criminal prosecution. This is obviously important; however, because the Court decided that damages could be obtained for a

---

210. Zeigler, *supra* note 6, at 678 (footnotes omitted). Many jurisprudential scholars accept this conclusion. *See, e.g.*, THEODORE M. BENDITT, RIGHTS 51 (1982) ("[O]ne can't say that he has a right, then and there, to do something if he is not permitted, then and there, to do it. Another way of putting this is to say that a right doesn't exist if one can't act on it (or insist on it)."). Joel Feinberg states:

> Why is the right to demand recognition of one's rights so important? The reason, I think, is that if one begged, pleaded, or prayed for recognition merely, at best one would receive a kind of beneficent treatment easily confused with the acknowledgment of rights, but in fact altogether foreign and deadly to it.

JOEL FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 141 (1980); *see also* IREDELL JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW 254–55 (1980) ("The doctrine of legal rights teaches us that declarations of rights are vain without an effective apparatus to implement them."). Some writers include the element of enforceability in their definition of legal rights. *See, e.g.*, MORRIS GINSBERG, ON JUSTICE IN SOCIETY 74 (1965) ("Legal rights are claims enforceable at law."); JENKINS, *supra*, at 247 ("Natural rights are merely claims, regardless of the intellectual justification and emotional fervor with which they are pressed."); BLACK'S LAW DICTIONARY 1324 (6th ed. 1990) (defining "right" as "legally enforceable claim of one person against another, that the other shall do a given act, or shall not do a given act").

211. 503 U.S. 60 (1992); *see supra* notes 161–79 and accompanying text.

212. 403 U.S. 388 (1971).

213. U.S. CONST. amend. IV.

214. *Bivens*, 403 U.S. at 389.

Fourth Amendment violation, the right also meant that Bivens could obtain compensation for the intrusion, terror, and property damage.[215] Thus, the kind of remedy a person may obtain defines both the scope and meaning of the right.[216]

Decisions about rights also directly affect remedies. If a court decides that a statutory provision does not confer a right on the plaintiff because the provision is not mandatory or because it is too vague and amorphous, then the plaintiff obviously gets no remedy at all. For example, in *Pennhurst State School & Hospital v. Halderman*,[217] the Court concluded that the Bill of Rights provision in the statute at issue only made "findings" that were intended to be hortatory, not mandatory, and that the phrases "appropriate treatment" and "least restrictive setting" were too ambiguous to provide sufficiently clear notice to the States of what they agreed to if they took federal money.[218] Because the statute conferred no rights on the plaintiffs, they were entitled to no remedy.

In other cases a court may decide that although a statute creates rights and duties, they are not as broad as the plaintiff's claim. If plaintiffs are unable to fit their case within the court's narrow definitions, they are effectively remediless. For example, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,[219] an issuer of bonds defaulted, and bondholders sued the issuer and several other parties under § 10(b) of the Securities Exchange Act of 1934,[220] which imposes private civil liability on those who commit a manipulative or deceptive act in connection with the purchase or sale of securities. Plaintiffs sought to hold one of the defendants, Central Bank, "'secondarily liable under § 10(b) for its conduct in aiding and abetting the fraud.'"[221] The Court

---

215. *Id.* at 390–91.

216. *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), discussed *supra* notes 147–148 and accompanying text, also illustrate this point. In *Bush*, the plaintiff was returned to his job and got backpay for an illegal retaliatory demotion, but was unable to obtain attorney's fees or damages for the emotional distress and mental anguish. 462 U.S. at 371–72, 388. Similarly, in *Schweiker*, the plaintiffs eventually were restored to disabled status and were awarded full retroactive benefits after being wrongly terminated from a Social Security disability program, but they were unable to obtain damages for the emotional distress and other hardships suffered because of the delays in the receipt of their benefits. 487 U.S. at 425, 428–29. In both cases, the limits on the remedy limited the scope and meaning of the rights.

217. 451 U.S. 1 (1980); *see supra* notes 114–129 and accompanying text.

218. *See supra* notes 126–29 and accompanying text.

219. 511 U.S. 164 (1994).

220. *Id.* at 168.

221. *Id.* (quoting plaintiffs' complaint). The bonds were issued by a local Colorado building authority to finance public improvements at a planned residential and business center. *Id.* at 167. The bonds were secured by landholder assessment liens. *Id.* The bond covenants mandated that the land

declined to extend § 10(b) to impose a duty on parties who do not directly engage in the illegal deception, but merely aid or abet the violation.[222] Plaintiffs thus had no rights against Central Bank, and no remedy.

A decision about a cause of action directly affects both rights and remedies. A cause of action in this context, whether created explicitly or implicitly, is something that says, in effect, "If someone violates your legal right you can sue him for relief."[223] Section 1983 creates what is probably the best-known federal cause of action.[224] In awkward phrasing, it says that if a person acting under color of state law deprives someone of a federally protected right, the injured party can sue the wrongdoer for damages or equitable relief.[225] A cause of action thus connects a right and a remedy. It is an essential link between a right and a remedy that enables the right to be enforced. Plainly, if you have no cause of action, you have no right and no remedy.[226] A cause of action also may be

---

that was subject to the liens be worth at least 160% of the bonds' total outstanding principal and interest. *Id.* The covenants also required the developer to give Central Bank, the indenture trustee for the bond issues, an annual report containing evidence that the 160% requirement was met. *Id.* Central Bank did not diligently investigate or ensure that the requirement was met. *Id.* at 168–69.

222. *Id.* at 177–78.

223. The meaning of the phrases "cause of action" and "right of action" has been elusive historically, *see supra* Part I.A., and it continues to be so today. Justice Powell defined "private cause of action" to mean "the right of a private party to seek judicial relief from injuries caused by another's violation of a legal requirement." Cannon v. Univ. of Chi., 441 U.S. 677, 730 n.1 (1979) (Powell, J., dissenting). Consider Justice Harlan's definition in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 402 n.4 (1971) (Harlan, J., concurring): "The notion of 'implying' a remedy, therefore, as applied to cases like *Borak*, can only refer to a process whereby the federal judiciary exercises a choice among traditionally available judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law." Justice Brennan defined "cause of action" in *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979), as "a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court" and then separated that question from the question of what remedies should be available. Justice Brennan's definition of cause of action is so incomplete as to be almost meaningless. The definition begs the question: For what purpose does the plaintiff want to invoke the power of the court?

224. *See* 42 U.S.C. § 1983 (1994).

225. Section 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Id.

226. For example, consider *California v. Sierra Club*, 451 U.S. 287 (1981), where the Court held that a fisherman had no cause of action under § 10 of the Rivers and Harbors Appropriations Act of 1899, which forbids obstruction to the navigable capacity of any waters of the United States unless

defined in a way that limits the available remedy and thus limits the right as well. For example, Congress sometimes creates a cause of action for injunctive relief only.[227] As explained above, this sort of limitation on the remedy necessarily limits the scope and meaning of the right.[228]

In sum, the questions whether the statute confers a right, whether a cause of action should be implied, and whether a remedy can be granted do not have much meaning in isolation. A right without a remedy is not a legal right because it is not enforceable. A right without a cause of action is not a right for the same reason. A cause of action without a right or remedy is meaningless. Because a cause of action acts to connect a right and a remedy, it has no meaning if there is nothing to connect. Finally, a remedy obviously cannot stand alone either. One is entitled to a remedy only for the violation of a right.

2. *Problems Caused by Trying To Separate the Inseparable*

The Court's attempts to separate these inseparable concepts have caused several problems. The Court's analysis is necessarily incomplete when it discusses only one part of the rights-remedies equation. By focusing on only one part of the equation, the Court does not acknowledge the impact of its decision on the other parts.[229] The Justices sometimes appear to confuse themselves by their overly narrow focus on

---

authorized by Congress, to sue California to enjoin it from constructing water diversion facilities that took fresh water from the delta where he fished and thus degraded the water. *Id.* at 297–98. By denying the fisherman a cause of action, the Court also deprived him of any remedy and extinguished any rights he might have had under the Act. Similarly, when the Court in *Suter v. Artist M.*, 503 U.S. 347, 350 (1992), refused to imply a private right of action on behalf of children to enforce a provision of the Adoption Assistance and Child Welfare Act of 1980 requiring state officials to make reasonable efforts to keep children in their own homes prior to placement in foster care, it effectively deprived the children of any remedy to enforce this provision, and thus of any right to have state officials make reasonable efforts to keep them out of foster care.

227. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 n.5 (1970) (explaining that Public Accommodations Act provides injunction as exclusive means of enforcing rights provided in statute).

228. *See supra* notes 212–16 and accompanying text.

229. The Court's separate treatment of rights, rights of action, and remedies is reminiscent of one of the Court's tests for deciding whether a case arises under federal law. Under the so-called *Mottley* rule, a case arises under federal law only if the federal issue necessarily appears on the face of the plaintiff's well-pleaded complaint, Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908), even if the case turns on an important issue of federal law that is the only real issue in the case. *Id.* The Court essentially puts on blinders and refuses to see what is actually going on. For a critique of the *Mottley* rule, see Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987).

a single factor. In other cases the Court either disguises or actually misstates what it is doing.

The continuing controversy over the status of *Cort v. Ash*[230] is one example of the confusion caused by separating rights, rights of action, and remedies. Several of the Justices appear genuinely perplexed and a bit angry that the ghost of *Cort v. Ash* will not go quietly.[231] Ironically, even those Justices most adamant that it be banished forever continue to cite it and discuss the four factors.[232] Many of the Justices want to limit the inquiry in implied right of action cases solely to the second *Cort* criteria: Did Congress intend to create the cause of action that the plaintiff asserts?[233] It is very difficult, however, to focus only on the cause of action and ignore the rights being asserted and the remedy sought. As a result, the first and third *Cort* criteria[234] tend to creep back in, forcing even the anti-*Cort* Justices to concede that these factors remain the means to determine the key issue of congressional intent.[235]

The first *Cort* factor continues to be important because the Court must consider the purpose of a cause of action in deciding whether

---

230. 422 U.S. 66 (1975); *see supra* notes 96–101 and accompanying text.

231. *See supra* notes 96, 101.

232. *See, e.g.*, Suter v. Artist M., 503 U.S. 347, 363–64 (1992) (Rehnquist, C.J.) (referring to "familiar test of *Cort v. Ash*" and quoting four-factor test, while noting that most important inquiry is whether Congress intended to create cause of action plaintiff asserts).

233. *See, e.g.*, Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13 (1981) ("The key to the inquiry is the intent of the Legislature. . . . We look first, of course, to the statutory language . . . [and] [t]hen we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent."); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15–16 (1979):

> While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, . . . what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear.

Id.; Touche Ross & Co. v. Redington, 442 U.S. 560, 575–76 (1979) ("The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.").

234. *Cort*, 422 U.S. at 78. The Court stated:

> First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff? . . . Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff?

Id.

235. *See, e.g.*, California v. Sierra Club, 451 U.S. 287, 293 (1981) ("[T]he ultimate issue is whether Congress intended to create a private right of action . . . but the four factors specified in *Cort* remain the 'criteria through which this intent could be discerned.'") (quoting Davis v. Passman, 442 U.S. 228, 241 (1979)); *accord* Thompson v. Thompson, 484 U.S. 174, 179 (1988) (same); Tex. Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981) (same); Univs. Research v. Coutu, 450 U.S. 754, 770 (1981) (same).

Congress intended to create it. A plaintiff does not come to court asserting a cause of action in the abstract. Instead, a plaintiff asserts that a particular federal statute grants a right that the defendant has violated, and asks the Court to imply a cause of action to enforce that right. The Court must then look at the provision and ask whether "the statute create[s] a federal right in favor of the plaintiff."[236] It is almost impossible to answer the question of whether Congress intended to create a cause of action to enforce the right the plaintiff asserts without deciding whether the statute actually confers the right. Consequently, the first *Cort* factor continues to be central in implied right of action cases, even when the Court does not specifically identify it as such, but instead disguises it as an inquiry into the language of the statute or the legislative history.[237]

Similarly, it is very difficult for the Court to avoid considering the third *Cort* factor—"is it consistent with the underlying purposes of the legislative scheme to imply [a particular] remedy for the plaintiff?"[238]—in deciding implied right of action cases. By definition, the statute does not explicitly create the cause of action, and the legislative history is silent as to whether Congress actually intended to create it.[239] If a statutory provision appears to confer a right on the plaintiff, the Court would have difficultly deciding whether Congress wanted the right to be judicially enforceable without looking at whether it would foster or subvert the underlying statutory purposes to allow such lawsuits. Thus, unless the Court looks at the overall statutory purposes, it denies itself access to the information it needs to answer the question whether Congress intended to create the cause of action.[240]

---

236. *Cort*, 422 U.S. at 78.

237. *See, e.g., Transamerica*, 444 U.S. at 16–17 ("[W]e begin with the language of the statute itself.... It is apparent that the two sections were intended to benefit the clients of investment advisers...."); *Touche Ross*, 442 U.S. at 568–69 ("[O]ur analysis must begin with the language of the statute itself.... [Section] 17(a) neither confers rights on private parties nor proscribes any conduct as unlawful.").

238. *Cort*, 422 U.S. at 78.

239. *See Thompson*, 484 U.S. at 179 (noting that "'the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question'" of whether Congress actually had in mind creation of private cause of action) (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 694 (1979)); *Transamerica*, 444 U.S. at 18 (noting that it is not surprising that legislative history is silent on whether Congress intended to create private right of action given that Act does not explicitly provide any private remedies).

240. As with the first *Cort* factor, the Court sometimes discusses the third *Cort* factor without explicitly acknowledging that it is doing so. *See, e.g.*, Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 (1985) ("A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.") (footnote omitted); *Transamerica*, 444 U.S. at 18 (explaining that congressional intent to create private right

The Court's separation of rights, rights of action, and remedies sometimes leads it to disguise what it is doing. *Wilder v. Virginia Hospital Ass'n*,[241] one of the § 1983 cases in the *Thiboutot* line, provides such an example. In the guise of deciding whether the statute conferred a right and whether the private remedy the plaintiff sought was foreclosed by the existence of a comprehensive remedial scheme, the Court essentially performed a *Cort v. Ash* analysis. The majority claimed that its inquiry was different from deciding whether to imply a private right of action.[242] The dissenting Justices disagreed in part, noting the overlap between the criteria for determining whether a statutory provision confers a right and the first *Cort v. Ash* criterion.[243] Closer examination, however, reveals that the majority's analysis actually overlaps with the first three *Cort* criteria.

In *Wilder*, a Virginia health care provider brought a § 1983 suit against state officials claiming that Virginia's reimbursement plan violated a provision of the federal Medicaid Act requiring payment rates that "are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities."[244] The plaintiff sought declaratory and injunctive relief requiring defendants to promulgate a new state plan and to provide interim rates commensurate with payments under the Medicare program.[245] The defendants argued the Act did not create any enforceable rights and Congress had foreclosed enforcement of the Act under § 1983.[246]

To evaluate the defendant's first argument, the Court used the three-part test articulated in *Golden State Transit Corp. v. City of Los Angeles*;[247] namely, whether Congress intended the provision to benefit someone like the plaintiff, whether it is mandatory, as opposed to merely reflecting a congressional preference, and whether it is too vague and amorphous for judicial enforcement.[248] As the dissent noted, the first of these questions is very like the first *Cort* factor: "[I]s the plaintiff 'one of the class for whose *especial* benefit the statute was enacted'"?[249] The

---

of action "may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment").

241. 496 U.S. 498 (1990).

242. *Id.* at 508 n.9.

243. *Id.* at 524–27 (Rehnquist, C.J., dissenting, joined by O'Connor, Scalia, and Kennedy, J.J.).

244. *Id.* at 502–04.

245. *Id.* at 504.

246. *Id.* at 514–22.

247. 493 U.S. 103 (1989).

248. *Wilder*, 496 U.S. at 509.

249. Cort v. Ash, 422 U.S. 66, 78 (1975) (quoting Tex. & Pac. R.R. Co. v. Rigsby, 241 U.S. 33, 39 (1916)).

Court easily concluded that the requirement was met, stating that "[t]here can be little doubt that health care providers are the intended beneficiaries" of the provision requiring reasonable and adequate reimbursement rates.[250]

The second *Golden State* question—whether the provision is mandatory or merely reflects a congressional preference—overlaps the second *Cort* inquiry: "[I]s there any indication of legislative intent, explicit or implicit, either to create [a private] remedy or to deny one?"[251] If the provision is mandatory, that means the state must comply, which in turn suggests that the provision should be enforceable. The Court read the statutory language as saying the state reimbursement plan "must" provide for rates of payment that are reasonable and adequate as "a congressional command."[252] While this command need not necessarily be enforceable by a private lawsuit, the fact that Congress made the provision mandatory clearly is relevant to deciding whether there is "any indication of legislative intent, explicit or implicit," to create a private remedy.[253] Plainly, the Court's inquiry into whether the provision was mandatory overlaps substantially with the second *Cort* question.

Finally, whether a private remedy was foreclosed by the existence of a comprehensive enforcement scheme overlaps the third *Cort* question: "[I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?"[254] The *Wilder* Court noted the Medicaid Act contains few enforcement provisions.[255] The Secretary of Health and Human Services can withhold approval of state plans or withhold federal funds from states whose plans do not comply with the Act.[256] Because the amendments to the Act were intended to provide even less oversight by the Secretary,[257] the existence of a private judicial remedy for health care providers clearly was consistent with Congress's

250. *Wilder*, 496 U.S. at 510.

251. *Cort*, 422 U.S. at 78.

252. *Wilder*, 496 U.S. at 512. The Court rejected defendant's argument that the statute only required the state to make findings and give assurances its rates are reasonable and adequate and did not require the state to adopt rates that actually *are* reasonable and adequate. *Id.* at 513–15.

253. The Court also cited additional evidence of congressional intent to allow private enforcement of the provision. The current provision amended an earlier one that allowed health care providers to sue in federal court for injunctive relief to ensure that they were reimbursed according to reasonable and adequate rates. *Id.* at 516. During debate on the amendment, legislators stated that it should not be construed to limit the rights of health care providers to seek injunctive relief in federal or state court. *Id.* at 517.

254. *Cort*, 422 U.S. at 78.

255. *Wilder*, 496 U.S. at 521.

256. *Id.*

257. *Id.* at 522.

intent to require states to reimburse them at reasonable and adequate rates. How else could the requirement be enforced? Indeed, although the Court does not say so, the existence of the private remedy is probably necessary to effectuate the underlying congressional purpose. In sum, although the Court purported to talk only about whether the statute confers a right and whether the private remedy the plaintiff sought was foreclosed by the existence of a comprehensive remedial scheme, the discussion is very similar to a *Cort v. Ash* analysis.

The Court's separate treatment of rights, rights of action, and remedies sometimes leads it to misstate what it is doing. For example, in *Gebser v. Lago Vista Independent School District*[258] and *Davis v. Monroe County Board of Education*,[259] the two recent Title IX sexual harassment decisions,[260] the Court purports only to delimit the remedy that a student can obtain from a school district,[261] but in fact it also circumscribes students' rights and rights of action under Title IX. Students do not have a general right to be free of sexual harassment at school because the Court imposes several conditions on recovery. *Gebser* holds that a damage remedy may not be recovered from a school district for sexual harassment of a student by a teacher unless a school district official with authority to intervene has actual notice of the teacher's misconduct and does nothing.[262] *Davis* also imposes an "actual notice-deliberate indifference" condition on recovery for student-on-student harassment, along with the further conditions that the district have "substantial control over both the harasser and the context in which the . . . harassment occurs"[263] and that the harassment be so severe as to deny the victim equal access to school programs.[264] A school district has a duty to protect students from sexual harassment only if these conditions are satisfied. If these conditions are not satisfied, the school district has no duty and the students have no right to be protected. If students have no right and no remedy, the Title IX implied right of action is of no use.[265] Because the decisions in *Gebser* and *Davis* so plainly affect

258. 524 U.S. 274 (1998).

259. 526 U.S. 629 (1999).

260. These decisions are discussed *supra* notes 180–207 and accompanying text.

261. *See Davis*, 526 U.S. at 639 ("[A]t issue here is the question whether a recipient of federal education funding may be liable for damages under Title IX under any circumstances for discrimination in the form of student-on-student sexual harassment."); *Gebser*, 524 U.S. at 284 ("[W]e have a measure of latitude to shape a sensible remedial scheme . . . .").

262. *See Gebser*, 524 U.S. at 277, 290–91.

263. *Davis*, 526 U.S. at 645–47.

264. *Id.* at 633, 650.

265. Ms. Gebser's complaint did not allege actual knowledge of harassment by school officials. *Gebser*, 524 U.S. at 278–79. Consequently, she had no right against the school district to be free of

students' rights and rights of action, it is very misleading for the Court to contend that it is only addressing the scope of the damage remedy.

B. Two Models Governing Judicial Enforcement of Federal Statutes

Rights, rights of action, and remedies cannot be separated. When a court makes a decision about one of them it necessarily affects the other two. The Court's attempt to separate the inseparable has caused confusion, distortion, and misstatement. The Court could integrate rights, rights of action, and remedies if it used one test for deciding whether a federal statutory provision should be judicially enforceable. To assist in framing a test, this section presents the adversarial and cooperative models for the judicial enforcement of federal statutes.

1. The Adversarial Model

The basic premise of the adversarial model is that the federal courts should play a limited role in the interpretation and implementation of federal legislation. The federal courts should not invade state prerogatives or perform legislative functions. As Justice Powell stated in *Cannon v. University of Chicago*,[266] "[t]he dangers posed by judicial arrogation of the right to resolve general societal conflicts have been manifest to this Court throughout its history."[267] The federal courts must be modest, cautious, and even passive.

Why then is this model called "adversarial?" This term is used because the attitudes of some who support this model are not actually passive but instead are passive-aggressive.[268] U.S. Supreme Court

---

that harassment, and her implied right of action under Title IX was entirely disabled. Ms. Davis's complaint probably could survive the "substantial control," "actual knowledge," and "deliberate indifference" requirements because the harassment occurred at school. Ms. Davis's mother complained repeatedly to school officials, and they failed to take any action. *Davis*, 526 U.S. at 633–35. It is unclear whether the harassment she alleged was so severe and pervasive that it barred her access to school. *Id.* at 635–36. If it was not, then she too had no right against the district to be free of that harassment, and her implied right of action was of no use.

266. 441 U.S. 677 (1979).

267. *Id.* at 744 (Powell, J., dissenting).

268. *See* Stewart & Sunstein, *supra* note 6, at 1199, 1230 ("[T]he formalist thesis [that federal courts must have some textual warrant, constitutional or statutory, for adding new remedies to administrative systems] denies the respect for the sovereign lawgiver upon which it is supposedly based and is thus internally inconsistent."). Lack of respect for the legislatures is not new. *See, e.g.*, Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383 (1908) ("Not the least notable characteristics of American law today are the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers.").

Justices sometimes reveal their resentment of Congress. In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,[269] Justice Stevens admitted that "a Court that is properly concerned about the burdens imposed upon the federal judiciary, the quality of the work product of Congress, and the sheer bulk of new federal legislation, has been more and more reluctant to open the courthouse door to the injured citizen."[270] Justice Powell believed that the *Cort v. Ash* test encouraged Congress to be irresponsible: "Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide. When this happens, the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned."[271]

Proponents of the adversarial model seek to shift decision-making responsibility back to Congress. They believe that if Congress wants a statute to confer a right, create a cause of action, or provide a remedy, it must say so expressly, fully, and unambiguously.[272] Moreover, the Court recently has made plain that if legislation is vague or incomplete, it is Congress's job to fix it, not the Court's. As then-Justice Rehnquist put it

---

269. 453 U.S. 1 (1981).

270. *Id.* at 24–25 (Stevens, J., concurring in the judgment and dissenting in part); *see also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374 (1982) ("Our approach to the task of determining whether Congress intended to authorize a private cause of action has changed significantly, much as the quality and quantity of federal legislation has undergone significant change.").

271. *Cannon*, 441 U.S. at 743 (1979) (Powell, J., dissenting). Hans Linde suggests that crass political maneuvering may underlie a legislative decision to define rights with vague and amorphous language and to omit express rights of action and remedies from a statute:

> [As to] social legislation that places the burden of progress on those whom it regulates, a very low prospect of effectiveness may be the *sine qua non* of winning enactment of the law at all.... Contrary to the instrumentalist canon, the ineffectiveness of a law to achieve its goal may be itself a policy, a policy shared by the act's opponents and some of its supporters, and may be the price for permitting the law to reach enactment....
>
> People have reasons for wanting a law, and the lawmaker will see a value in meeting their wishes, quite apart from any practical good it may do.

Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 233 (1976).

272. *See, e.g.*, Suter v. Artist M., 503 U.S. 347, 357–60 (1992) (holding that Congress did not unambiguously confer on child beneficiaries of Adoption Assistance and Child Welfare Act of 1980 right to enforce requirement that state make "reasonable efforts" to prevent child from being removed from his family, and once removed, to reunify him with his family); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 18–19, 24–25 (1981) (holding that Bill of Rights provision of Developmentally Disabled Assistance and Bill of Rights Act of 1975 did not confer right on Pennhurst residents to "appropriate treatment" in "least restrictive" setting because Congress listed this "right" as "finding" and because phrases are too ambiguous to impose specific obligations).

in *Touche Ross & Co. v. Redington*,[273] the Court should not attempt to "improve upon the statutory scheme that Congress enacted into law."[274]

While it thus is appropriate to call this model "adversarial," I do not mean to suggest that proponents of the adversarial model are unprincipled. To the contrary, several weighty arguments support their stance. Separation-of-powers principles preclude the federal courts from assuming legislative functions. It is not proper for the Court to transform aspirational provisions of statutes into mandatory provisions, thereby creating rights that Congress did not create. As the Court stated in *Rosado v. Wyman*,[275] "Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred directions."[276]

Similarly, Justice Powell argued eloquently in *Cannon v. University of Chicago*[277] that judicial creation of a cause of action violated separation-of-powers principles. He believed that in addition to encouraging Congress to act irresponsibly, the *Cort* test "too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement."[278] In addition, he argued that "[d]etermining whether a private action would be consistent with the 'underlying purposes' of a legislative scheme permits a court to decide for itself what the goals of a scheme should be, and how those goals should be advanced."[279] According to this view, Congress knows how to create private rights of action explicitly when it wants to, and the Court should not take over the legislative role.[280] Moreover, when a statute provides some remedies, courts should be "'chary of reading others into it.'"[281]

---

273. 442 U.S. 560 (1979).

274. *Id.* at 578; *accord* Univs. Research Ass'n v. Coutu, 450 U.S. 754, 770 (1981).

275. 397 U.S. 397 (1970).

276. *Id.* at 413.

277. 441 U.S. 677 (1979).

278. *Id.* at 740 (Powell, J., dissenting).

279. *Id.* (Powell, J., dissenting). Similarly, in *Thompson v. Thompson*, 484 U.S. 174, 192 (1988), Justice Scalia stated in his concurring opinion that it was "dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor."

280. *Cf.* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15–16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 572 (1979).

281. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985) (quoting *Transamerica*, 444 U.S. at 19); *see also* Northwest Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 94 n.30 (1981) ("'A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume

Proponents of the adversarial model also rely on principles of federalism. Modern federal legislation often regulates matters that traditionally were left to the states. Congress does not usually preempt state law, but instead legislates against the backdrop of state law. Reading federal statutes liberally to maximize the creation of rights, rights of action, and remedies may invade state prerogatives in ways that Congress did not intend.[282] In many instances state remedies are available to cure wrongdoing and federal remedies are unnecessary. Federalism concerns are particularly important when plaintiffs sue state and local government. The Spending Clause cases that require Congress to use clear and unambiguous language when it imposes conditions on the grant of federal moneys to states[283] protect the states from unexpected federal intrusion and control.

Some proponents of the adversarial model believe that *Erie Railroad Co. v. Tompkins*[284] and its progeny limit the power of the federal courts to create private remedies for violations of federal statutes. *Erie*, of course, explicitly restricted the power of the federal courts to declare rules of general common law.[285] Consequently, while it may have been permissible in the freewheeling days before 1938 to create causes of action and use any available remedy to redress a wrong, such practices are improper today.[286]

Several pragmatic arguments also support the adversarial model. Congress's lawmaking powers are superior to those of the courts because it can gather facts, set priorities, and accommodate different viewpoints in providing rights, rights of action, and remedies.[287] Congress can

---

other remedies.'") (quoting Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974)).

282. *See, e.g.*, Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 541 (1984) ("[A] corporation's rights against its directors or third parties with whom it has contracted are generally governed by state, not federal, law."); Cort v. Ash, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.").

283. *See supra* notes 114–29 and accompanying text.

284. 304 U.S. 64 (1938).

285. *Id.* at 78.

286. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 401 (1982) (Powell, J., dissenting); Carlson v. Green, 446 U.S. 14, 36–38 (1980) (Rehnquist, J., dissenting); Cannon v. Univ. of Chi., 441 U.S. 677, 732 (1979) (Powell, J., dissenting).

287. *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 647 (1981) (noting that legislative bodies can provide "'the kind of investigation, examination, and study that courts cannot,'" and that legislative process "'involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives.'" (quoting Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980)).

legislate prospectively and comprehensively, and can create administrative agencies to implement legislation. Courts, by contrast, lack the "self-starting investigatory and analytical capacities" needed to address broad social and economic problems, and are unable to ensure that enforcement will be centralized and coordinated.[288] In addition, the complexity of modern legislation requires greater reliance on Congress.[289] Intricate policy calculations may be necessary to adjust and coordinate enforcement of complex legislation, and judicial creation of additional causes of action or remedies may disrupt a delicate balance.[290] Thus, when a statute contains a comprehensive remedial scheme including an integrated set of enforcement mechanisms, a court should presume that Congress deliberately omitted any additional remedies.[291] A court should not imply any additional private rights of action, grant additional remedies not specifically authorized by the statute,[292] or allow plaintiff to rely on § 1983 or other general causes of action that may exist outside the statute itself.[293] Finally, and of ever-increasing importance,

---

288. *See* Stewart & Sunstein, *supra* note 6, at 1208–09; *see also Carlson*, 446 U.S. at 36 (Rehnquist, J., dissenting). Judge Henry J. Friendly once summarized a legislature's advantages in making law:

> [T]he legislature's superior resources for fact gathering; its ability to act without awaiting an adventitious concatenation of the determined party, the right set of facts, the persuasive lawyer, and the perceptive court; its power to frame pragmatic rules departing from strict logic, and to fashion a broad new regime or to bring new facts within an existing one; its practice of changing law solely for the future in contrast to the general judicial reluctance so to proceed; and, finally, the greater assurance that a legislative solution is not likely to run counter to the popular will: all these give the legislature a position of decided advantage, if only it will use it.

Henry J. Friendly, *The Gap in Law-Making—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 791–92 (1963) (footnotes omitted).

289. *See Texas Industries*, 451 U.S. at 646 (noting that "range of factors to be weighed in deciding whether a right to contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue"); *see also* Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 811–12 (1986); *Merrill Lynch*, 456 U.S. at 377.

290. *See* Frankel, *supra* note 6, at 570–84 (arguing that private compensatory actions are ill-suited to deterrence system of securities laws and may hamper central purposes of those statutes); Stewart & Sunstein, *supra* note 6, at 1206–07 (arguing that judicial creation of private rights of action may usurp administrative agency's responsibility for enforcement of statute and decrease legislative control over enforcement activity).

291. *See* Northwest Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 97 (1981) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."); *see also Texas Industries*, 451 U.S. at 645 (same).

292. *See* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985) (stating that "six carefully integrated civil enforcement provisions" of statute "provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate").

293. *See* Smith v. Robinson, 468 U.S. 992, 1011 (1984). The Court stated:

tighter standards would help reduce the flood of cases to the federal courts.[294]

2. *The Cooperative Model*

The basic premise of the cooperative model is that the federal courts should play a constructive and supportive role in interpreting and implementing federal legislation. Proponents of this model view the drafting, enactment, interpretation, and implementation of legislation as a single, ongoing process. All actors in this process, whether legislative, administrative, or judicial, must work together to help achieve the underlying goals of federal statutes. The process should not be a minefield where judges wait to pounce on legislators' missteps, omissions, or vague language to nullify statutory provisions.[295] Instead, the federal courts should construe and enforce federal law to protect basic personal rights and help ensure that government benefits and entitlements are distributed in a fair, timely, and complete manner. The cooperative model embraces the traditional equating of rights and remedies. Proponents believe the federal courts' role "is to ensure completeness and consistency in the whole fabric of the law, including those legal norms established through regulatory schemes."[296]

Proponents of the cooperative model disagree with proponents of the adversarial model about separation-of-powers and federalism principles. Separation-of-powers principles do not preclude a federal court from reading a statutory provision to entitle a plaintiff to the remedy sought, even if the provision does not confer a right on the plaintiff with crystal clarity or expressly designate the appropriate remedy.[297] Under the

---

> In light of the comprehensive nature of the procedures and guarantees set out in the [Education of the Handicapped Act] . . . we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to [federal] court with an equal protection claim to a free appropriate public education.

Id.; *see also* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 21 (1981) (concluding that comprehensiveness of remedies provided "demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983").

294. *See Merrell Dow*, 478 U.S. at 811–12; *Merrill Lynch*, 456 U.S. at 377.

295. *See* Stewart & Sunstein, *supra* note 6, at 1230–31 ("If a judge insists that the sovereign use a particular verbal formula to confer authority, he restricts the sovereign's lawmaking authority by precluding other approaches, such as reliance on background understandings.") (footnote omitted).

296. *Id.* at 1228.

297. *See Merrill Lynch*, 456 U.S. at 375–76 ("Because the *Rigsby* approach has prevailed throughout most of our history, there is no merit to the argument . . . that judicial recognition of an implied remedy violates the separation-of-powers doctrine.") (footnote omitted).

traditional standards, federal courts performed precisely this role from the founding of the Republic until the early 1970s.[298] The founders recognized that separation of powers could not be rigid or absolute. Instead, they considered some blending of powers as necessary for effective government.[299] Congress cannot see all of the situations to which a law may apply. Therefore, the federal courts must be free to fill statutory interstices to ensure completeness of consistency in federal law and to provide appropriate remedies.[300] This exercise of judicial power is not a usurpation of legislative authority, but rather is a necessary supplement to it.[301] Finally, if Congress believes that the courts have made a serious error in interpreting a federal statute, Congress can amend it.[302]

Proponents of the cooperative model do not believe that principles of federalism preclude a federal court from playing a constructive and supportive role in interpreting and implementing federal legislation.[303] Federal-state relations are involved only peripherally in the relationship between two branches of the federal government. It does not follow from the fact that Congress usually legislates against the backdrop of state law that Congress does not want federal statutes liberally and beneficially

298. *See supra* Part I.A.

299. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."); JAMES O. FREEDMAN, CRISIS AND LEGITIMACY 18 (1978) (explaining that separation of powers has "not preclude[d] one branch of government from participating in functions assigned primarily to another").

300. *See* Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957) ("[S]eparation of powers cannot be watertight; exclusive reliance upon statutory provision for the solution of all problems is futile."); *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 77, 287 (1980) ("[A]llowing courts to resolve the private liability question requires neither unusual nor undemocratic exercises of judicial power and, within limits, reflects a sensible allocation of functions between the judiciary and the legislature."); *see also* Brown, *supra* note 79, at 623–25; Linda Sheryl Greene, *Judicial Implication of Remedies for Federal Statutory Violations: The Separation of Powers Concerns*, 53 TEMP. L.Q. 469, 487–89 (1980).

301. *See* Stewart & Sunstein, *supra* note 6, at 1228–31; Albert Tate, Jr., *The Law-Making Function of the Judge*, 28 LA. L. REV. 211, 222 (1968).

302. *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 97 (1980); Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 9 (1936).

303. *See* Zeigler, *supra* note 6, at 720 (noting that traditional criteria for formulating remedies "allow a sympathetic, cooperative effort by the courts to work with Congress in effectuating underlying congressional purposes and goals").

construed to achieve its goals. Moreover, state law often does not provide adequate remedies.[304]

For somewhat similar reasons, proponents of the cooperative model believe that the *Erie* doctrine is almost irrelevant to the question of whether a federal statutory provision entitles a plaintiff to the federal judicial remedy the plaintiff seeks.[305] The *Erie* doctrine addresses the question of whether federal or state law should apply in a federal lawsuit and has little to do with the relations between the federal courts and Congress.[306] The federal courts may not create general federal common law in areas constitutionally left to state control, but the federal courts plainly may create specific common law in areas properly within federal cognizance.[307] As Paul J. Mishkin stated, "At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress."[308]

Proponents of the cooperative model also reject many of the pragmatic arguments put forth to support limiting the role of the federal courts in interpreting and enforcing statutes. Congress plainly is better situated than the courts to make law, but this argument misses the point. A court does not legislate at large when it decides to enforce a specific statutory provision. Instead, its discretion is channeled and hedged about on all sides by Congress's words. At this stage of the law making and enforcing process, a court's perspective often will be superior. Congress cannot anticipate all of the situations to which a law may apply, and thus it cannot always specify in advance the precise remedy that justice requires.[309] A court, by contrast, can assess the actual effectiveness of the

304. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 301 n.11 (1998) (Stevens, J., dissenting) (responding to majority's suggestion that plaintiff may have right of recovery against school district as matter of state law by noting that state law immunizes school district from liability).

305. *See* Brown, *supra* note 79, at 622–27; Foy, *supra* note 6, at 583 ("Nor does the doctrine of *Erie Railroad v. Tompkins* have anything to do with the question of implied private remedies."); Frankel, *supra* note 6, at 563–66; Hazen, *supra* note 6, at 1375–82.

306. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

307. *See* D'Oench Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 469–70 (1942) (Jackson, J., concurring); *see generally* Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

308. Mishkin, *supra* note 300, at 799–800.

309. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947) ("The intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction."); Stewart & Sunstein, *supra* note 6, at 1229 ("It is a

remedies expressly authorized by Congress[310] and decide whether granting the remedy plaintiff seeks would foster or frustrate congressional purposes. Thus, when faced with the question whether the federal statutory provision the plaintiff relies on creates an entitlement to the judicial remedy sought, courts should ask whether Congress, if it had considered this specific situation, would have said "aye" or "nay."[311]

Courts also should not be overly concerned about upsetting the delicate balance of statutory enforcement provisions. Deciding whether a particular statutory provision confers an enforceable right on the plaintiff is not intrinsically more difficult than other tasks courts routinely undertake.[312] A court can delve as deeply as necessary into legislative history to determine whether granting plaintiff the remedy sought will seriously interfere with congressional purposes. Moreover, many statutory-enforcement mechanisms are neither comprehensive nor finely tuned.[313] Congress often leaves a great deal of discretion to administrative agencies in selecting sanctions because the legislators cannot anticipate the exact activity that should be proscribed.[314] Thus, the fact that Congress expressly authorizes remedies for violation of some statutory provisions should not deter a court from granting a remedy for violation of another provision.[315] Finally, if the workload of the federal courts is too heavy, there are better ways to deal with the problem than by denying relief to people who otherwise deserve it.

III. A PROPOSED NEW STANDARD AND ITS APPLICATION

Proponents of the "pure" version of each model are not likely to agree on a test for deciding whether a statutory provision should be judicially enforceable. Advocates of the adversarial model would likely favor a standard that combined Justice Scalia's position in *Thompson v.*

---

commonplace that a lawmaker cannot anticipate all of the situations to which a law may be applied; as a result, he cannot specify in advance the legal consequences of all future events.").

310. *See* Comment, *Private Rights of Action under* Amtrak *and* Ash*: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1393 (1975).

311. Some scholars assert that the tenets of the adversarial model would improperly keep a court from supplementing a remedial scheme that proves inadequate to accomplish clear congressional purposes. *See, e.g.*, Frankel, *supra* note 6, at 566.

312. *See The Supreme Court, 1979 Term*, *supra* note 300, at 287.

313. *See, e.g.*, Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 520–24 (1990) (concluding that Medicaid Act does not contain comprehensive remedial scheme); Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 424 (1987) (concluding that Housing Act does not provide comprehensive remedies).

314. *See* Stewart & Sunstein, *supra* note 6, at 1290.

315. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 711 (1979).

Thompson[316]—no more implied rights of action—and a clear-statement rule requiring Congress to confer rights and authorize remedies in express, unambiguous terms. Advocates of the cooperative model, by contrast, would probably favor a return to the traditional standards that granted any available judicial remedy for a statutory violation as long as the statute was intended for the benefit of the class of persons of which the plaintiff was a member and the harm suffered was of a kind that the statute generally was intended to prevent.[317]

Neither course is appropriate. It is impractical to return to the traditional standards. While "[f]ew principles of the American constitutional tradition resonate more strongly than . . . for every violation of a right, there must be a remedy,"[318] the principle states an ideal that was never fully achieved[319] and cannot be today.[320] In addition, today Congress enacts an enormous amount of legislation, much of it vague, sprawling, and amorphous. It no longer seems workable to allow people to sue to enforce any provision of a federal statute that arguably is intended for their benefit. Nor, on the other hand, should courts adopt the overly restrictive standards suggested by the adversarial model. Even if legislators could write with perfect clarity, they simply cannot anticipate all of the situations to which their words may apply. Thus, the restrictive standards place an unrealistic responsibility on Congress and unfairly disadvantage those whom Congress seeks to help by legislating.

Instead, the courts should chart a middle course between these two extremes. The test should incorporate the generous, constructive impulses of the cooperative model and the cautionary concerns of the adversarial model. Courts may properly play a cooperative and supportive role in implementing federal legislation. A majority of the Justices have rejected the arguments that separation-of-powers principles and the *Erie* doctrine prohibit a federal court from implying a private right of action from a federal statute or granting a damage remedy to

316. 484 U.S. 174, 192 (1988) (Scalia, J., concurring) ("[W]e should get out of the business of implied rights of action altogether.").

317. *See supra* Part I.A.

318. Fallon & Meltzer, *supra* note 16, at 1778.

319. *See supra* notes 15–17 and accompanying text.

320. *See* DAVID SCHOENBROD ET AL., REMEDIES: PUBLIC AND PRIVATE 50 (1990) ("[I]t is probably more accurate to say that where there's a right, there may be many remedies, or none.") If there is no remedy, of course, what Professor Schoenbrod, et alia, call a "right" is only a hope or a wish. *See also* Fallon & Meltzer, *supra* note 16, at 1777 ("[N]ot every violation of constitutional rights is centrally relevant to the question of enforceable duties for which the jurisdiction of an enforcement court is invoked."); Zeigler, *supra* note 6, at 680–81 (suggesting many practical reasons why "rights" cannot have remedies).

enforce an existing cause of action.[321] Courts should work with Congress to try to achieve the underlying goals of federal statutes. At the same time, courts should be sensitive to the pragmatic concerns of proponents of the adversarial model. They should not seek to convert every vague, aspirational provision of a federal statute into a font of enforceable rights. They should carefully examine how the remedy the plaintiff seeks would fit into the overall remedial scheme of the statute to ensure that the litigation does not undercut Congress's purposes. They should also consider whether the plaintiff's lawsuit will be manageable and whether it might lead to a flood of similar cases.

Courts should not take any part of the rights-remedies equation as a given in deciding whether the federal statutory provision the plaintiff relies on entitles the plaintiff to the judicial remedy he or she seeks. It is not helpful to assume a priori that the right, the right of action, or the remedy is secure, and then to focus only on the remaining elements. This sort of assumption is misleading, as demonstrated above.[322] Because rights, rights of action, and remedies cannot be separated, a decision concerning one of them necessarily affects the other two. Thus, there is simply no point in pretending that one or more elements of the rights-remedies equation is secure in any lawsuit where an element is in play.

Because the elements are interrelated, the separate criteria developed by the Court for assessing each element are not sufficient to answer the overarching question of whether the statutory provision on which a plaintiff relies creates the rights and duties claimed and entitles the plaintiff to the particular remedy sought. The three-part *Golden State* test for deciding whether a statute confers a right[323] cannot alone answer whether Congress wanted a person such as this plaintiff to be able to enforce the right or to obtain a particular remedy. The *Touche Ross-Transamerica* test, which uses only the second *Cort* factor[324] to decide

---

321. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 73–74 (1992) (rejecting argument that separation-of-powers principles prohibit "the authority to award appropriate relief"); Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 375–76 (1982) ("Because the *Rigsby* approach prevailed throughout most of our history, there is no merit to the argument advanced by petitioners that the judicial recognition of an implied private remedy violates the separation-of-powers doctrine."). Only Justices Powell and Rehnquist have stated that implication of a private right of action violates the *Erie* doctrine. Carlson v. Green, 446 U.S. 14, 36–38 (1980) (Rehnquist, J., dissenting); Cannon v. Univ. of Chi., 441 U.S. 677, 732 (1979) (Powell, J., dissenting) (stating that *Rigsby* was decided under regime of *Swift v. Tyson*, 41 U.S. (6 Pet.) 1 (1842), and thus "cannot be taken as authority for the judicial creation of a cause of action not legislated by Congress").

322. *See supra* notes 229–65 and accompanying text.

323. *See supra* notes 135–36 and accompanying text.

324. Cort v. Ash, 422 U.S. 66, 78 (1975) ("[I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?").

whether to create a private right of action, does not work very well in making that decision, as is shown by the Court's continuing reliance on the other *Cort* factors.[325] Finally, the presumption that where rights have been invaded and a federal court has jurisdiction to hear the case, all appropriate remedies are available to make good the wrong done,[326] does not help a court decide whether the statutory provision in question actually confers the right the plaintiff claims or whether Congress would want this plaintiff to obtain the specific remedy sought.

What is needed in place of these tests is a single, integrated test. This Article suggests taking parts of all of the tests and combining them in a new way that will allow the courts to play a cooperative, positive role in interpreting and enforcing federal legislation while avoiding the pitfalls identified by proponents of the adversarial model. The proposed test is more an analytic process than a set of fixed criteria. The test has several steps that focus on key questions and consider important cautionary factors.[327] The steps are set forth below.

A. The Language of the Statute

Courts routinely begin with the statutory language when interpreting a statute,[328] and the actual words are a logical starting point in this context as well.[329] The plaintiff claims the defendant violated a right

---

325. *See supra* notes 230–240 and accompanying text.

326. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 66 (1992); Bell v. Hood, 327 U.S. 678, 684 (1946).

327. Preliminarily, remember that the analysis that follows is necessary only in cases where the statutory provision fails expressly to provide one or more of the three elements. If the provision clearly confers a right on the plaintiff, specifically creates a cause of action, and authorizes the exact remedy the plaintiff seeks, then the court should simply proceed to determine whether the plaintiff can prove the case.

328. *E.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991) ("The best evidence of [Congress's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President."); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (1990) ("The starting point for interpretation of a statute 'is the language of the statute itself.'") (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940) ("[T]he function of the courts is . . . to construe the language so as to give effect to the intent of Congress.").

329. The Court has routinely begun its inquiry with the language of the statute in implied right of action cases. *E.g.*, Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 534 (1984) ("In determining whether § 36(b) confers a right that could be judicially enforced by an investment company, we look first, of course, at the language of the statute."); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979) ("[W]e begin with the language of the statute itself."); Touche Ross & Co. v. Redington, 442 U.S. 560, 568–69 (1979) ("[O]ur analysis must begin with the language of the statute."). And in cases in the *Thiboutot* line, the Court inquires whether a statutory provision confers a right on the plaintiff. *E.g.*, Suter v. Artist M., 503 U.S. 347, 358–60 (1992) (examining statutory

granted by a particular federal statutory provision. What does the provision say? Is there a clear and logical fit between the language and the defendant's conduct? In other words, does it expressly or specifically prohibit the defendant from doing what he has done or require him to do something he has failed to do?[330] In addition, does the provision appear to have been enacted to protect someone like the plaintiff? The standard for evaluating statutory language suggested in *Cannon v. University of Chicago*[331] is helpful. Does "the language of the statute explicitly confer[] a right directly on the class of persons that include[] the plaintiff in the case," or does it only "create duties on the part of persons for the benefit of the public at large"?[332] Congress is more likely to have intended the provision to be enforced in a private suit by plaintiff in the former instance than in the latter.

The first *Cort* criteria—"Is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted'"?[333]—is too restrictive in one way and not restrictive enough in another. Use of the word "especial" suggests that a statute cannot confer enforceable rights on several groups of people in the same statutory provision. This reading is too restrictive. Congress can confer rights of primary and secondary importance in one provision and still intend that they all be enforced. If plaintiff can only show that he is a part of the class for whose *secondary* benefit the statute was enacted, that should not automatically disqualify him from enforcing the provision. In *Cort* itself, the Court denied a private right of action to stockholders under a federal criminal provision prohibiting corporations from making contributions to candidates in presidential elections because the provision's primary purpose was to benefit the public at large by freeing elections from the power of corporate money, while protecting stockholders' interests in seeing that corporate funds were not given to candidates whom they did not support "was at best a secondary concern."[334] It is not clear why Congress's desire to protect stockholders did not *support* implication of a private right of action on their behalf.

---

language to decide whether Congress in enacting Adoption Act unambiguously conferred certain rights upon children); Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509–16 (1990) (examining statutory language while applying three-part *Golden State* test).

330. If the answer to either of these questions is a clear no, the case is at an end. *E.g.*, Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 177 (1992) (noting that absence of text in Securities Exchange Act of 1934 imposing duty to refrain from aiding and abetting § 10(b) violation "resolves the case").

331. 441 U.S. 677 (1979).

332. *Id.* at 690–92 & n.13.

333. Cort v. Ash, 422 U.S. 66, 78 (1975) (quoting Tex. & Pac. R.R. Co. v. Rigsby, 241 U.S. 33, 39 (1916)).

334. *Id.* at 81.

The first *Cort* factor also is not restrictive enough because it does not specifically require that the provision be mandatory rather than precatory. This requirement, which is borrowed from the *Golden State* test, is important. In enacting social legislation, Congress often begins with a lengthy policy statement explaining why the legislation is needed and what it is intended to accomplish.[335] Such provisions often are only statements of aspirations written to introduce the legislation and to make Congress look good. While such provisions may indicate that the statute was enacted for the benefit of a particular group, Congress may not have intended that these general provisions be judicially enforceable.

Professor Henry Monaghan suggests that the *Golden State* test distinguishes "between those who are 'incidental' beneficiaries of federal programs imposing duties and those who are intentionally protected."[336] The *especial* benefit language of *Cort* may be intended to make this distinction as well. If Congress intended to benefit a group of which plaintiff is a member, even though this group is only the secondary or tertiary beneficiary of the provision, then courts should probably grant plaintiff a remedy. On the other hand, if Congress truly did not intend to benefit the group and the seeming benefit the plaintiff claims results from careless or imprecise drafting, a court probably should not grant relief. The problem, of course, is deciding where to draw the line.

Some examples help illustrate the distinction and the difficulty in drawing the line. In *Massachusetts Mutual Life Insurance Company v. Russell*,[337] the plaintiff was a beneficiary under two employee benefit plans administered by Massachusetts Mutual.[338] She alleged that the fiduciaries administering the plans improperly cut off her benefits for a back ailment and violated federal regulations by taking 132 days to process her claim.[339] Although plaintiff's benefits were restored and full retroactive benefits were paid, she sued for the financial losses suffered because her disabled husband was forced to cash out a retirement plan to tide them over and for psychological injury caused by the stress.[340]

335. *See, e.g.*, Individuals With Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 651, 111 Stat. 37, 123–24 (1997) (listing, inter alia, several goals that effective educational systems must seek to achieve in addressing needs of children with disabilities).

336. Monaghan, *supra* note 6, at 250.

337. 473 U.S. 134 (1985).

338. *Id.* at 136.

339. *Id.* at 136–37.

340. *Id.* at 137.

The court of appeals held that § 409(a) of the Employee Retirement Income Security Act of 1974 (ERISA) entitled plaintiff to relief.[341] Section 409(a) reads:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate . . . .[342]

The Court reasoned that the long delay in processing plaintiff's claim breached defendant's fiduciary duty to process claims in a timely and diligent manner, that § 409(a) created a cause of action for a plan beneficiary, and that the language authorizing "such other equitable or remedial relief as the court may deem appropriate" gave the court wide discretion in ordering compensatory and punitive damages.[343]

The U.S. Supreme Court read § 409(a) differently. The Court pointed out that § 409(a) only requires a fiduciary who breaches his duty "to make good to such *plan* any losses to the plan resulting from each such breach."[344] It does not make the fiduciary liable to individual beneficiaries.[345] The next clause, which requires the fiduciary to restore to the plan any profits the fiduciary made through the misuse of plan assets, suggests that Congress's main goal in writing § 409(a) was to prevent misuse of plan assets by plan administrators, not to provide recompense to beneficiaries injured by bureaucratic delays.[346] The Court concluded that the lower court erred in jumping from the opening clause of § 409(a), which makes a fiduciary personally liable, to the catch-all remedial clause at the end, "skipping over the intervening language establishing remedies benefiting, in the first instance, solely the plan [and] divorc[ing] the phrase being construed from its context and construct[ing] an entirely new *class* of relief available to entities other than the plan."[347]

---

341. *Id.*
342. *Id.* at 139.
343. *Id.* at 137–38.
344. *Id.* at 139 (emphasis added).
345. *See id.* at 140.
346. *See id.* at 142.
347. *Id.* at 141–42.

The U.S. Supreme Court probably has the stronger argument, but it is a close call. Section 409(a) by its terms confers rights on the plan, and not on individual beneficiaries, and imposes a duty on the fiduciary to compensate the plan for any breach rather than individuals. In a broader sense, however, § 409(a) is intended to benefit plan beneficiaries. As the Court admits, the purpose of § 409(a) is to ensure the plan remains financially sound and its assets are not stolen or squandered by plan administrators so that moneys are available for plan beneficiaries.[348] Indeed, the whole purpose of the plan is to ensure that employees get disability benefits to which they are entitled when they are entitled to them.[349] Thus, in writing § 409(a) Congress intended to benefit the group of which plaintiff is a member, even if only in a derivative or secondary way. Arguably, therefore, plaintiff should have been given relief under the final clause of § 409(a) that makes the defendant "subject to such other equitable or remedial relief as the court may deem appropriate."[350]

California v. Sierra Club[351] provides another example of the difficulty in distinguishing between the intentional and incidental beneficiaries of a statutory provision. In this case the U.S. Supreme Court interpreted the statute incorrectly and denied a remedy to people Congress clearly intended to protect. California transported water from the wetter north to the more arid central and southern parts of the state.[352] Fresh water was gathered and stored behind dams and then released as needed into the Sacramento-San Joaquin Delta.[353] From there the water was diverted into canals and aqueducts to carry it south.[354] The fresh water released into the Delta could be degraded by salt water from the Pacific, so the state proposed to build a canal that would by-pass the Delta.[355] The Sierra Club, joined by a commercial fisherman and a Delta landowner, filed suit to stop the state from building the canal. They alleged that present and proposed diversions of fresh water from the Delta made the Delta water too salty.[356] Plaintiffs claimed that the canal project would violate their rights under § 10 of the Rivers and Harbors Act of 1899, which prohibits "[t]he creation of any obstruction not

348. *Id.* at 142.
349. *Id.*
350. *Id.* at 139.
351. 451 U.S. 287 (1981).
352. *Id.* at 290.
353. *Id.*
354. *Id.*
355. *Id.* at 291.
356. *Id.* at 292.

affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States . . . ."[357] Section 10 also makes it unlawful

> "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge . . . or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army . . . ."[358]

The lower courts concluded that plaintiffs could avail themselves of a private cause of action to enforce § 10.[359] The Ninth Circuit Court of Appeals reasoned that § 10 was "designed for the especial benefit of private parties who may suffer 'special injury' caused by an unauthorized obstruction to a navigable waterway."[360] The U.S. Supreme Court disagreed. The Court said the question was not whether plaintiffs would benefit from enforcement of § 10, "but whether Congress intended to confer federal rights upon those beneficiaries."[361] In this case, the language of the Act "states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further."[362] Thus, Congress was not concerned with the rights of individuals but rather with benefiting the public at large.

The court of appeals has the stronger argument. The statutory language strongly suggests Congress intended to confer rights on anyone who was directly harmed by an unauthorized obstruction, and this certainly includes the plaintiffs. Section 10 states that it is unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any . . . haven, harbor, canal, lake, harbor of refuge . . . or of the channel of any navigable water of the United States" without the required permission.[363] Building a forty-mile canal to divert large amounts of fresh water would clearly alter the condition or capacity of the Delta, a navigable water of the United States. Plaintiffs claimed that this change would cause them measurable harm.[364] Plaintiffs thus

---

357. *Id.* at 289 n.2.

358. *Id.* (quoting Rivers and Harbors Appropriation Act of 1899 § 10, 33 U.S.C. § 403 (1994)).

359. *Id.* at 292. The court of appeals held that the necessary approvals had been obtained as to one part of the project. *Id.*

360. *Id.* at 293–94.

361. *Id.* at 294.

362. *Id.*

363. Rivers and Harbors Appropriation Act of 1899 § 10, 33 U.S.C. § 403 (1994).

364. *Sierra Club*, 451 U.S. at 291–92.

appear to be members of the class for whose especial benefit the statute was enacted. Indeed, people harmed by obstructions or changes in the condition of navigable waters would seem to be the primary group the statute was enacted to protect, while members of the general public are only incidental beneficiaries.

The U.S. Supreme Court stressed that the statute does not expressly state that § 10 was enacted for the benefit of people harmed by violation of the provision.[365] This distinguished *Sierra Club* from a case like *Cannon v. University of Chicago*,[366] where the statute explicitly identified the intended beneficiaries.[367] But it is easy to determine who Congress intended to protect in § 10. Although Congress did not say expressly it intended to benefit people harmed by obstructions, its intentions are clearly and fairly inferable from the statutory language. Requiring a certain form of words frustrates, rather than furthers, Congress's intent.[368]

---

365. *Id.* at 294.

366. 441 U.S. 677 (1979).

367. *Id.* at 682 n.3 (discussing statute requiring that "[n]o person . . . on the basis of sex [shall] be . . . subjected to discrimination under any education program . . . receiving federal financial assistance").

368. In *Suter v. Artist M.*, 503 U.S. 347 (1992), the Court engaged in a tortured reading of a statutory provision to deny plaintiffs relief. The plaintiffs' brought a class action against an Illinois state agency charged with caring for abused and neglected children. They claimed the defendants were violating a provision of the Adoption Assistance and Child Welfare Act of 1980. *Id.* at 351–52. The Act was passed pursuant to Congress's spending power and required that to be eligible for payments, a state "shall have a plan approved by the Secretary." *Id.* at 351. The statute required, inter alia, that as of October 1, 1983, the plan provide "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home . . . ." *Id.* The plaintiffs claimed that the agency was failing to comply with this provision because it did not assign caseworkers promptly to children placed in agency custody. *Id.* The district court ordered that a caseworker be assigned within three working days and the court of appeals affirmed. *Id.* at 353.

The U.S. Supreme Court reversed, holding that the provision did not unambiguously confer a right upon children to enforce the "reasonable efforts" language. *Id.* at 363. The Court admitted that the language was mandatory, but held that the provision merely required that states have a plan that provides that reasonable efforts will be made to keep children out of foster care, not that states actually make reasonable efforts to achieve this goal. *Id.* at 358. Moreover, the statute gave no guidance as to how reasonable efforts were to be measured, and thus, the meaning of the directive would vary from case to case. *Id.* at 359–60. The Court concluded that the provision imposed "only a rather generalized duty on the State, to be enforced not by private individuals," but by a cut-off of federal funds if the state is not complying with its own plan. *Id.* at 363.

Suter shows the adversarial model operating at its cynical worst. Did Congress really mean to require only that states have a plan stating that reasonable efforts would be made to keep children out of foster care, but not mean to require that states actually make those efforts? It seems unlikely that Congress wanted to make state officials go through the meaningless ritual of writing things down on a piece of paper that was a dead letter before the ink dried. In addition, the reasonable efforts standard does not seem any less judicially enforceable than the myriad other statutory and

B. The Overall Statutory Context

If it is unclear whether the language of the provision that a plaintiff relies on entitles the plaintiff to the particular remedy sought, a court should broaden the inquiry beyond that provision. A court should look at the overall structure and purpose of the statute for guidance. Several questions are pertinent. Why did Congress enact this statute? What was it trying to accomplish? What problem was the legislature responding to, and how did it seek to cure or correct it? What are people required to do under the law, and what are they forbidden from doing? By answering these questions, a court can provide a context for interpreting the provision. It can determine whether granting plaintiff (and others similarly situated) the remedy sought would be consistent with the underlying purposes of the statute, or helpful in accomplishing them, or perhaps even necessary to accomplish them.

The suggestion that courts consider the overall statutory context is controversial because of the U.S. Supreme Court cases that purport to reject the third *Cort* criterion,[369] which asks whether it is consistent with underlying statutory purposes to imply a private right of action for the plaintiff.[370] As explained above, however, the Court often cannot avoid this inquiry because it needs the information to decide whether the legislature intended either to create or deny a private right of action.[371] In addition, the Court expressly and routinely considers overall statutory structure and purpose when it decides whether a statute creates a right or authorizes a remedy.[372] As Professors Stewart and Sunstein point out, "Because reliance on these background understandings is inevitable . . . [i]n interpreting statutes that are silent on the existence of private enforcement rights . . . such reliance should be viewed as an established and legitimate device of lawmaking through statutory construction rather than a controversial intrusion on legislative prerogatives."[373]

---

common law requirements that people act reasonably. *See, e.g.*, Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 519–20 (1990) (finding judicially enforceable statutory requirement that state plan for medical assistance provide rates of payment that "are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities"). In sum, the *Suter* Court went out of its way to undercut Congress's intent to require that states make reasonable efforts to keep children out of foster care.

369. *See supra* notes 90–96 and accompanying text.

370. Cort v. Ash, 422 U.S. 66, 78 (1975).

371. *See supra* notes 239–40 and accompanying text.

372. *See infra* notes 383–96 and accompanying text.

373. Stewart & Sunstein, *supra* note 6, at 1231.

The Court candidly admitted it was considering the underlying statutory purposes and legislative history in deciding whether to imply a private right of action in *Thompson v. Thompson*.[374] David and Susan Thompson engaged in a dispute over custody of their son Matthew that ended with conflicting orders from courts in Louisiana and California.[375] To resolve the impasse, David brought suit in federal court under the Parental Kidnapping Prevention Act of 1980 to determine which state decree was valid.[376] The Act did not explicitly create a private right of action in favor of a parent, so the Court looked at "the context of the [Act] with an eye toward determining Congress' perception of the law that it was shaping or reshaping."[377] Congress passed the statute in response to a perceived epidemic of parental kidnapping.[378] Because custody decrees generally are modifiable to further the best interests of the child, the constitutional and statutory full faith and credit requirements did not reliably ensure national enforcement of custody decisions.[379] The Act was passed to make the Full Faith and Credit Clause more effective in custody cases.[380] Given this focus, the Court thought it would be incompatible "with the purpose and context of the legislative scheme" to create a private right of action that would substitute a federal court determination for state court application of the enhanced full faith and credit requirements.[381] Thus, the Court concluded that the overall statutory structure and purposes counseled against creation of a private right of action.[382]

The U.S. Supreme Court often considers statutory structure and purpose in deciding whether a statutory provision confers a right. For example, in *Musick, Peeler & Garrett v. Employers Insurance of Wausau*,[383] the Court relied on statutory structure and purpose in finding in a suit brought pursuant to § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission that a

374. 484 U.S. 174 (1988).
375. *Id.* at 178.
376. *Id.*
377. *Id.* at 180.
378. *Id.* at 180–81.
379. *Id.* at 181.
380. *Id.* at 181–82.
381. *Id.* at 183. Moreover, explicit statements in the legislative history indicated that Congress did not want the federal courts to play the enforcement role that plaintiff sought. *Id.* at 183–87. Congress wanted more full faith and credit among state courts and did not want the federal courts "to play Solomon" where two state courts issued conflicting custody orders. *Id.* at 186.
382. *Id.* at 187.
383. 508 U.S. 286 (1993).

defendant could seek a right to contribution from joint tortfeasors.[384] The Court examined two other sections of the Act—§§ 9 and 18—that were "close in structure, purpose, and intent to the 10b-5 action."[385] Both sections contained an express right to contribution.[386] The Court concluded: "We think that these explicit provisions for contribution are an important, not an inconsequential, feature of the federal securities laws and that consistency requires us to adopt a like contribution rule for the right of action existing under Rule 10b-5."[387]

The Court also routinely relies on overall statutory context in deciding whether a statute should be read to authorize the remedy the plaintiff seeks. In *Gebser v. Lago Vista Independent School District*[388] and *Davis v. Monroe County Board of Education*,[389] the two recent Title IX sexual harassment cases,[390] the Court generally examined Title IX "to ensure that we do not fashion the parameters of an implied right in a manner at odds with the statutory structure and purpose."[391] In *Gebser*, the Court found "important clues" in Title IX's express enforcement provisions that Congress did not intend to allow a damage remedy where liability was based on constructive notice or vicarious liability.[392] The express means of enforcement by administrative agencies assumed that recipients would be on actual notice of violations before any action was taken because an agency could not initiate enforcement proceedings until it had notified the recipient of its failure to comply and determined that compliance could not be achieved by voluntary means.[393] Similarly, the *Davis* Court looked to Title IX's other prohibitions to help give content to the term "discrimination" in the sexual harassment context.[394] Students are protected not only from discrimination, but also from being

384. *Id.* at 288.

385. *Id.* at 295.

386. *Id.* at 297.

387. *Id.* Similarly, in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), the Court looked beyond the statutory language in deciding that the National Labor Relations Act (NLRA) created rights that forbade the City to condition renewal of petitioner's taxicab franchise on settlement of a labor dispute between the petitioner and its union. *Id.* at 104–05. The City argued that because the duties of government are not expressly set forth in the Act, the Act did not create rights against the City or the State. *Id.* at 111. The Court disagreed, stating that the "language, structure, and history of the NLRA" all show that Congress meant to protect "certain rights of labor and management against governmental interference." *Id.*

388. 524 U.S. 274 (1998).

389. 526 U.S. 629 (1999).

390. *See supra* notes 180–207 and accompanying text.

391. *Gebser*, 524 U.S. at 284.

392. *Id.* at 288.

393. *Id.*

394. *Davis*, 526 U.S. at 650–51.

"excluded from participation in" or "denied the benefits of" any program receiving federal financial assistance.[395] Based on these other prohibitions, the Court concluded that sexual harassment amounts to prohibited discrimination only when it is so severe that students are effectively denied equal access to school programs.[396]

As yet another way of examining overall statutory context, courts sometimes consider which constitutional power Congress used in enacting the legislation for guidance in interpreting it. As to statutes enacted pursuant to the spending power, *Pennhurst State School & Hospital v. Halderman*[397] held that Congress must impose any conditions on a state accepting federal money in clear and unambiguous language or the Court will not enforce them.[398] While the *Pennhurst* rule may be reasonable, in recent years the Court has transformed it into a new standard that governmental entities receiving federal funds are liable only for their own knowing and intentional wrongdoing. The Court signaled the change in *Franklin v. Gwinnett County Public Schools*[399] when it stated that *Pennhurst* "observed that remedies were limited under . . . Spending Clause statutes when the alleged violation was *unintentional*" because the entity receiving federal funds "lacks notice that it will be liable for a monetary award."[400] The Court applied the new standard in *Gebser v. Lago Vista Independent School District*,[401] holding that a school district can be liable under Title IX for a teacher's sexual harassment of a student only when district officials have actual knowledge of the harassment and are deliberately indifferent to it.[402]

Indeed, the rule appears to have taken on a life of its own and is no longer anchored to the *Pennhurst* rationale. Saying that a fund recipient can be held liable only when it is put on clear notice of what it must do if it takes federal funds is not that same thing as saying that it can be held liable only for its own intentional wrongdoing. Assume Congress enacts

395. *Id.*

396. *Id.*

397. 451 U.S. 1 (1980).

398. *Id.* at 17. Moreover, a state must be given the option of either assuming the costs of complying with federal regulations or withdrawing from the program. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 596–97 (1983) (White, J.); *see also* Rosado v. Wyman, 397 U.S. 397, 420–21 (1970).

399. 503 U.S. 60 (1992).

400. *Id.* at 74.

401. 524 U.S. 274 (1998).

402. *Id.* at 292. The Court also applied the new standard in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 640–46 (1999) (holding school district liable under Title IX for student-on-student sexual harassment only when school officials have actual knowledge of harassment and deliberately fail to stop it).

a statute under the spending power that imposes a duty on states to supervise their employees to ensure they comply with the requirements of the new law and specifically imposes a respondeat superior standard of liability on the states for any wrongdoing by an employee. A state could be held liable for employee misconduct under the original *Pennhurst* rule because the states are clearly and unambiguously on notice of their duties. But states could not be held liable under the later cases that refuse to grant make-whole remedies except for knowing and intentional misconduct on the part of the fund recipient itself.

There may be good reasons not to impose liability on state and local government or supervisory officials for the actions of their subordinates unless the government or the official authorizes the action or at least knowingly allows it to continue,[403] despite the fact that such limitations conflict with normal tort principles of respondeat superior. Holding local government or government officials liable on a respondeat superior or constructive-notice basis may conflict with sovereign-immunity principles or impose unfair burdens on the officials who are often not in a position to supervise subordinates closely.[404] But these reasons have little to do with the rationale of the *Pennhurst* rule that it is unfair to hold a party to terms of a contract that are unclear or ambiguous. The Court has gone beyond assessing the statutory context of the provision on which plaintiff relies to making its own affirmative substantive policy choices about the scope of liability under statutes enacted pursuant to the spending power.

In sum, the overall structure and purpose of a statute often are crucial in determining whether the statutory provision on which a plaintiff relies creates the rights and duties claimed and entitles the plaintiff to the particular judicial remedy sought. The U.S. Supreme Court has looked to the statutory context in determining whether a statutory provision confers a right, creates a right of action, or authorizes a remedy. Reliance on these background understandings is a necessary and legitimate device for

---

403. The Court has imposed such limitations in § 1983 cases. The Court has refused to make municipalities liable under § 1983 for injuries inflicted by city employees unless they were acting pursuant to official government policy or custom. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692–95 (1978). Similarly, the Court has refused to impose § 1983 liability on city officials unless they affirmatively direct their subordinates to violate citizens' civil rights. *See* Rizzo v. Goode, 423 U.S. 362, 371, 376 (1976). As Professors Doernberg and Wingate observe, "[t]he Court's insistence in *Rizzo* on a direct, causal connection to establish individual liability compares closely with its insistence in *Monell* on finding a municipal statute, ordinance, custom, usage or policy in order to establish municipal liability." DONALD L. DOERNBERG & C. KEITH WINGATE, FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS 505–06 (2d ed. 2000).

404. *See* Scheuer v. Rhodes, 416 U.S. 232, 246–47 (1974).

construing unclear or ambiguous statutory provisions. The Court should continue to look to overall statutory structure and purpose, although it should be careful not to use the inquiry, as it does in the Spending Clause cases, as a means to impose its own ideas about the proper scope of liability.

C. Possible Reasons for Caution

Even if the language of the provision the plaintiff relies on and the overall statutory structure and purpose strongly support granting the plaintiff the particular remedy sought, a court should nonetheless consider several cautionary factors before allowing the case to proceed. A court should consider whether the action, and others like it, will be judicially manageable, whether granting a private remedy might interfere with the remedial scheme that Congress has expressly enacted, and whether allowing plaintiff to proceed will result in a flood of new lawsuits. There is, of course, no easy or mechanical way to determine when one or more of these factors justifies dismissing a lawsuit. But if federal courts may abstain entirely from hearing actions that Congress has explicitly directed them to hear,[405] surely they may decline for pragmatic reasons to hear lawsuits that Congress has not explicitly authorized.

1. Will the Plaintiff's Action, and Others Like It, Be Judicially Manageable?

An action seeking to enforce a provision of a complex regulatory or entitlement statute may be unmanageable for several reasons. The action may simply be too complicated, raising scientific or economic issues that courts are not well-equipped to resolve.[406] These problems may be particularly acute in class actions. As Professors Stewart and Sunstein point out, "Not only must the court resolve the question whether a violation of regulatory requirements occurred, but it also must attempt to measure the economic impact of noncompliance. In complex areas of economic regulation, such measurements may approach the

405. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 54 (1971) (ordering abstention in action seeking to interfere with pending state criminal prosecution); R.R. Comm'n v. Pullman Co., 312 U.S. 496, 500–01 (1941) (ordering plaintiff to proceed in state court where definitive interpretation of ambiguous provision of state law may accord plaintiff relief and obviate need to reach federal constitutional question raised by plaintiff's complaint).

406. *See* Stewart & Sunstein, *supra* note 6, at 1293.

impossible."[407] An action also may require a federal court to resolve sensitive issues of human relations that have traditionally been resolved in the state courts. In *Thompson v. Thompson*,[408] for example, the Court refused to authorize an action under the Parental Kidnapping Prevention Act of 1980 to determine which of two conflicting state custody decisions was valid because it did not want the federal judges to become entangled in state domestic-relations questions "that they have little expertise to resolve."[409]

An action to enforce a broad statutory provision also may pose manageability problems if the plaintiff seeks correspondingly broad injunctive relief that would be very expensive or would involve substantial restructuring of a government program. Moreover, as Professors Stewart and Sunstein point out, some "statutory norms that allow considerable flexibility in regulating conduct" do not create clear "bipolar right-duty legal relations."[410] Judicial enforcement is difficult in such cases unless the parties or the court can redefine and narrow the lawsuit to make judicial enforcement manageable.

Blessing v. Freestone[411] provides a good example of both of these problems. The case involved Title IV-D of the Social Security Act, a complex statute that requires a state, in exchange for federal monies, to "establish a comprehensive system to establish paternity, locate absent parents, and help families obtain support orders."[412] The statute also requires states to be in "substantial compliance" with its provisions.[413] Plaintiffs were custodial parents of children eligible to receive child support services from the State of Arizona under the Title IV-D.[414] They claimed the state agency charged with enforcing the statute had not taken adequate steps to obtain support payments from the fathers of their children because of "staff shortages, high caseloads, unmanageable backlogs, and deficiencies in the State's accounting methods and record-keeping."[415] The plaintiffs brought a class action on behalf of all children and custodial parents residing in Arizona who were or would be entitled to services under Title IV-D seeking a declaratory judgment that the state was not in "substantial compliance" with the statute and injunctive relief

407. *Id.*
408. 484 U.S. 174 (1988).
409. *Id.* at 186.
410. Stewart & Sunstein, *supra* note 6, at 1305.
411. 520 U.S. 329 (1997).
412. *Id.* at 333–34.
413. *Id.* at 335.
414. *Id.* at 332.
415. *Id.* at 337.

requiring affirmative measures to achieve substantial compliance "throughout all programmatic operations at issue."[416]

The Court initially expressed alarm that the plaintiffs' broadly worded request for relief "essentially invited the District Court to oversee every aspect of Arizona's Title IV-D program."[417] The Court held the substantial-compliance provision of Title IV-D did not create a federal right.[418] Instead, it was merely a "yardstick" for the Secretary of Health and Human Services to use in measuring the system-wide performance of the State's program.[419] The substantial-compliance provision and other provisions of Title IV-D requiring adequate staffing levels did not give rise to federal rights because:

> [T]he link between increased staffing and the services provided to any particular individual is far too tenuous to support the notion that Congress meant to give each and every Arizonan who is eligible for Title IV-D the right to have the State Department of Economic Security staffed at a "sufficient" level.[420]

In Stewart and Sunstein's terms, the statutory provisions plaintiffs relied on did not "create bipolar right-duty legal relations."[421] The Court ultimately remanded the case to the district court to give the plaintiffs an opportunity to narrow their claims and to identify specifically the rights they claimed defendants had violated.[422]

While the decision in *Blessing* seems correct, courts should not exaggerate manageability problems. Statutes often contain "reasonableness" or "adequacy" standards that may be enforced without getting a court into a quagmire. For example, in *Wright v. Roanoke Redevelopment & Housing Authority*,[423] the Court believed that HUD regulations requiring that a "reasonable" amount for utilities be included in the rent that a public housing authority could charge was not "beyond the competence of the judiciary to enforce" because the regulations set out guidelines for the authority to follow in making utility allowances.[424] Similarly, in *Wilder v. Virginia Hospital Ass'n*,[425] the Court held that a

416. *Id.*
417. *Id.* at 341.
418. *Id.* at 343.
419. *Id.*
420. *Id.* at 345.
421. Stewart & Sunstein, *supra* note 6, at 1305.
422. *Freestone*, 520 U.S. at 342, 349.
423. 479 U.S. 418 (1987).
424. *Id.* at 431–32.
425. 496 U.S. 498 (1990).

statutory provision giving state health care providers a right to a state medical plan that provided "reasonable and adequate" payment rates could be manageably enforced because the statute provided the benchmark of an "efficiently and economically operated facilit[y]" to help assess rates.[426]

The Court exaggerated the manageability problems in *Suter v. Artist M.*[427] when holding a statutory provision requiring caseworkers to make "reasonable efforts" to keep children out of foster care could not be workably enforced because the meaning of the directive would vary from case to case.[428] The district court had entered a carefully limited injunction requiring only that the state assign a caseworker to each child placed in state custody within three working days of the time the case was first heard in juvenile court, and assign a new caseworker to a child within three working days of the time the original caseworker relinquished responsibility of the case.[429] The efforts a caseworker should make to keep children with their biological parents were left up to the Agency and the caseworker. The district court apparently did not plan to review individual cases to see if efforts to keep children out of foster care were reasonable or to engage in elaborate, ongoing supervision of the details of the program. The district court order may not have ensured full compliance with the statutory provision, but the relief ordered clearly was judicially manageable.

2. *Will Granting a Private Remedy Interfere with the Remedial Scheme that Congress Expressly Enacted?*

Granting a plaintiff a remedy not authorized by a statute may occasionally interfere with the express remedial scheme that Congress enacted. In such a case, a court should be very reluctant to grant the remedy if it concludes the interference actually will occur. A court should not simply presume from the fact that Congress has enacted a comprehensive remedial scheme that any additional remedies are inappropriate. A court should deny relief only if the interference is obvious, or if Congress has expressly indicated that it does not want additional remedies.

---

426. *Id.* at 519. The Court concluded: "Although some knowledge of the hospital industry might be required to evaluate a State's findings with respect to the reasonableness of its rates, such an inquiry is well within the competence of the Judiciary." *Id.* at 520.

427. 503 U.S. 347 (1992).

428. *Id.* at 359–60.

429. *Id.* at 353.

Professors Stewart and Sunstein assert that a mix of public and private enforcement is often the best means of enforcing federal regulatory or entitlement programs.[430] They find "largely unpersuasive" the objection that judicial authorization of private enforcement might upset legislative fine-tuning of remedies:

> Statutory language is often so general or ambiguous that the legislature could not confidently predict the specific kind of activity against which enforcement action will be brought. The fine-tuning argument is even less convincing when, as is common, an agency has a lump-sum budget to cover enforcement of numerous provisions. Moreover, statutes often give agencies considerable discretion in selecting among alternative sanctions and penalty levels. These considerations severely weaken the argument that the legislature anticipates and controls enforcement levels in a way that would be undermined by judicial creation of private rights of action.[431]

Consequently, a court should not assume that additional remedies are inappropriate simply because a remedial scheme is comprehensive or already includes some private remedies. As Stewart and Sunstein point out, refusing to grant an additional private remedy in such circumstances

> begs the question by assuming that congressional silence reflects an intention to foreclose judicial creation of such rights. It is equally plausible that sanctions and appropriations have been tailored in contemplation of possible private enforcement. Congress may wish to take advantage of the courts' ability to draw upon experience with implementation of a particular regulatory program and to judge the impact and desirability of private rights of action.[432]

Thus, a court should deny relief only if the defendant can demonstrate that the private remedy plaintiff seeks would actually undermine or work at cross purposes with the remedies Congress has authorized.

This analysis suggests that the Court was wrong in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*[433] to deny summarily a private remedy under federal environmental statutes to fisher-

430. Stewart & Sunstein, *supra* note 6, at 1202. Although they recognize that there is some danger private actions may usurp an agency's responsibility for regulatory implementation, *id.* at 1206–07, they also state private actions can be a useful supplement to public enforcement, which is often inadequate because of budget restraints. *Id.* at 1214.

431. *Id.* at 1290 (footnotes omitted).

432. *Id.* at 1291 (footnotes omitted).

433. 453 U.S. 1 (1981).

men injured by the dumping of sludge and sewage into the ocean off the New York and New Jersey coasts. The Court denied relief simply because the statutes contained "elaborate enforcement provisions" without even considering whether the remedy the plaintiff sought would interfere with the statutory enforcement scheme or otherwise undermine legislative intent.[434] The Court also was wrong in *Massachusetts Mutual Life Insurance Co. v. Russell*[435] in refusing to authorize a private remedy for extra-contractual damages on behalf of a beneficiary of an employee benefit plan against a fiduciary of the plan without considering whether the remedy would undermine or be inconsistent with other remedies allowed by the plan. The Court wrongly presumed from ERISA's "interlocking, interrelated, and interdependent remedial scheme"[436] that Congress did not intend any additional remedies without pointing to any express statements to support that conclusion.[437]

In *Smith v. Robinson*,[438] by contrast, the Court appeared to apply the correct standards in deciding that a private remedy would actually interfere with express statutory remedies. Plaintiff, a child suffering from cerebral palsy and a variety of physical and emotional handicaps, brought suit charging that a Rhode Island school district had denied him the right to a free, appropriate public education.[439] He claimed a denial of due process and equal protection under the Fourteenth Amendment and § 1983, and a violation of the Education of the Handicapped Act (EHA).[440] The plaintiff eventually won on the merits and claimed attorneys fees.[441] Fees were recoverable on the § 1983 claim, but not under the Act.[442] Whether plaintiff was entitled to fees thus depended on whether the § 1983 claim was viable or had been supplanted by the Act. The Court concluded that both the provisions of the statute and the

434. *Id.* at 14–15. The Court in a footnote claimed that the Senate Reports on the two statutes emphasized the limited nature of the citizen suits authorized, although it did not explain what the limitations were. *Id.* at 17 n.27. It also quoted from the remarks of a single legislator during debates on another statute, the Clean Air Act, to the effect that a private damage remedy was not authorized by that statute. *Id.* Because the citizen-suit provision of one of the statutes was modeled on the parallel provision of the Clean Air Act, the Court concluded that Congress would not have approved the fishermen's suit for damages. *Id.* These fragmentary references do not amount to a serious and thorough consideration of whether the plaintiffs' lawsuit would have interfered with the statutory enforcement scheme or undermined legislative intent. *Id.*

435. 473 U.S. 134 (1985).

436. *Id.* at 146.

437. *Id.* at 146–48.

438. 468 U.S. 992 (1984).

439. *Id.* at 995.

440. *Id.* at 994.

441. *Id.* at 998.

442. *Id.* at 1002.

legislative history "indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute."[443] In reaching this conclusion, the Court appeared to consider whether independent § 1983 claims would actually interfere with these mechanisms. The Court stated that allowing § 1983 claims would "render superfluous most of the detailed procedural protections outlined in the statute."[444] Moreover, "it would also run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education."[445] Finally, the Court stated that "[a]llowing a plaintiff to circumvent the EHA administrative remedies would be *inconsistent* with Congress' carefully tailored scheme."[446] Thus, in *Smith* the Court appeared to assess the actual negative impact of an unauthorized private remedy on the Act's remedial mechanism, rather than merely assuming from the existence of a comprehensive remedial scheme that no additional private remedies should be allowed.

The Court also was wrong in *Touche Ross & Co. v. Redington*[447] and *Transamerica Mortgage Advisors, Inc. v. Lewis*[448] to deny private remedies simply because Congress provided private remedies under other sections of the statute involved in each case. In *Touche Ross*, the Court refused to allow a private damage remedy under § 17(a) of the Securities Exchange Act of 1934 against an accounting firm that conducted an allegedly improper audit and certification of a broker-dealer's financial statement.[449] The Court noted that several nearby sections of the Act created private rights of action and concluded from this that Congress did not want a private remedy under § 17(a): "Obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly."[450] The Court drew a similar inference in *Transamerica*. It refused to allow a private remedy under § 206 of the Investment Advisers Act of 1940 against the investment advisers of a trust charged with fraud and breach of fiduciary duty because other sections of the Act expressly authorized private

443. *Id.* at 1009.
444. *Id.* at 1011.
445. *Id.* at 1012.
446. *Id.* (emphasis added).
447. 442 U.S. 560 (1979).
448. 444 U.S. 11 (1979).
449. *Touche Ross*, 442 U.S. at 579.
450. *Id.* at 571–72.

remedies while § 206 did not.[451] In both cases, the Court should instead have asked whether allowing a damage remedy would have interfered with other enforcement provisions, or whether there were any statements in the legislative history showing that Congress did not want a private remedy under the sections of the acts on which plaintiffs relied.

The Court has followed the correct approach in other cases. For example, in *Musick, Peeler & Garrett v. Employers Insurance of Wausau*,[452] the Court considered whether allowing a right of contribution from joint tortfeasors in a 10b-5 action would "conflict with Congress' own express rights of action."[453] The Court noted that §§ 9 and 18 of the Securities Exchange Act, which are close in structure and purpose to § 10(b), both expressly provide for a right of contribution.[454] Instead of inferring from the existence of these other private remedies that it should *not* create a contribution remedy under § 10(b), the Court concluded that it should.[455] The Court also considered whether the contribution remedy would "detract[] from the effectiveness of the 10b-5 implied action or interfere[] with the effective operation of the securities laws," and concluded that it would not.[456] Similarly, in *Cannon v. University of Chicago*,[457] the Court stated: "The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section."[458] Instead, the Court required some "other, more convincing, evidence that Congress meant to exclude the remedy."[459]

In sum, a court should not assume additional remedies are inappropriate simply because Congress has enacted a comprehensive remedial scheme or has included some private remedies in a statute. If the other factors courts consider point in favor of authorizing the remedy plaintiff seeks, the court should grant it unless it would interfere with the statute's express remedial scheme or Congress has expressly ruled out the remedy.

---

451. *Transamerica*, 444 U.S. at 19–20.
452. 508 U.S. 286 (1993).
453. *Id.* at 295.
454. *Id.* at 295–97.
455. *Id.* at 297.
456. *Id.* at 298.
457. 441 U.S. 677 (1979).
458. *Id.* at 711.
459. *Id.*

3. *Will Allowing the Plaintiff To Proceed Result in a Flood of New Lawsuits?*

A court may properly consider whether authorizing a remedy for the plaintiff will inundate the courts with lawsuits from other people similarly situated. In a time when federal judicial resources are stretched thin, the federal courts must not take on more cases than they can competently adjudicate. Many times in our history the U.S. Supreme Court has adopted rules to help keep caseloads manageable. For example, following the 1875 grant of general civil federal question jurisdiction to the lower federal courts,[460] the U.S. Supreme Court adopted the rule that a federal question must appear on the face of the plaintiff's well-pleaded complaint, thus greatly restricting the number of cases that could be brought in federal court.[461] Similarly, the traditional equitable doctrine that a federal court will not intervene in a pending state criminal proceeding was given new life in *Younger v. Harris*[462] by a Court presumably fearful that the federal courts were about to be engulfed by thousands of lawsuits from state criminal defendants alleging constitutional violations in their state proceedings.[463] In addition, the decisions of the Burger Court restricting the availability of federal habeas corpus responded to the dramatic increase in habeas corpus filings in the late 1960s and early 1970s.[464] And indeed, the Court has acknowledged that the "increased complexity of federal legislation and the increased volume of federal litigation" prompted the adoption of the strict new standards for implying private rights of action in the late 1970s and early 1980s.[465]

While caseload is a legitimate concern, the world is increasingly busy, and the federal courts have become more efficient and have

460. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (codified at 28 U.S.C. § 1331 (1994)).

461. For a discussion of the cases adopting this rule, see Doernberg, *supra* note 229, at 611–18.

462. 401 U.S. 37 (1971).

463. *See* Stefanelli v. Minard, 342 U.S. 117, 123–24 (1951) (asserting that allowing state defendants to come to federal court to raise constitutional challenges to procedures followed in their pending state criminal cases "would invite a flanking movement against the system of State courts by resort to the federal forum"); *see generally* Donald H. Zeigler, *Federal Court Reform of State Criminal Justice Systems: A Reassessment of the* Younger *Doctrine from a Modern Perspective*, 19 U.C. DAVIS L. REV. 31, 92–98 (1985) (discussing whether flood of litigation actually would occur if *Younger* doctrine were abandoned).

464. *See* Donald H. Zeigler & Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 169–73 (1972) (presenting statistics demonstrating great increase in habeas petitions).

465. Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 377 (1982).

adopted substantial reforms to enable them to keep pace with increasing caseloads.[466] Finally, as Justice Harlan once said:

> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.[467]

Justice Harlan's remarks may sound quaint today, but the maxim "where there is a right, there is a remedy" should still have enough force that courts will not deny remedies unless the practical consequences of granting a remedy would seriously hamper their ability to function.

CONCLUSION

In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,[468] Justice Stevens stated: "When should a person injured by a violation of federal law be allowed to recover his damages in a federal court? This seemingly simple question has recently presented the Court with more difficulty than most substantive questions that come before us."[469] This Article suggests that the Court caused much of the difficulty itself by separating rights, rights of action, and remedies, and talking about them as though they were independent of one another. Cases asking whether a statute confers a right, implies a right of action, or authorizes a remedy all involve the same basic question: Does the applicable statutory provision entitle a plaintiff to the particular judicial remedy he or she seeks? This Article has proposed a single, integrated test to answer this question. If the Court were to follow this standard, it would take the first step in putting its rights-remedies jurisprudence in order.

---

466. *See* Zeigler, *supra* note 463, at 69–76; *see also* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM (1996) (describing federal court efforts to keep pace with increasing caseloads); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000) (describing and critiquing rise of managerial judging).

467. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

468. 453 U.S. 1 (1981).

469. *Id.* at 22–23 (Stevens, J., joined by Blackmun, J., concurring in judgment and dissenting in part).